(2) 00-746

No. ——

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Argued January 27, 2000 Decided May 5, 2000

No. 98-1196

Arizona Public Service Company,
Petitioner

v.

Environmental Protection Agency,
Respondent

State of Michigan, et al.,
Intervenors

Consolidated with
98-1208, 98-1206, 98–1207, 98-1208

On Petitions for Review of an Order of the
Environmental Protection Agency

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Henry V. Nickel argued the cause for petitioners National Association of Manufacturers, et al. and Intervenors State of Michigan and Central and South West Services, Inc. With him on the briefs were *David S. Harlow, John B. Weldon, Jr., Brian J. Renaud, Jennifer M. Granholm,* Attorney General for the State of Michigan, and *John Fordell Leone,* Assistant Attorney General for the State of Michigan. *Norman W. Fichthorn, Cynthia H. Evans, Roy S. Belden, Janice S. Amundson, Donald D. Skypeck, Harold P. Quinn, Jr.,* and *Thomas L. Casey,* Solicitor General for the State of Michigan, entered appearances.

Thomas A. Lorenzen and *Cynthia A. Drew,* Attorneys, United States Department of Justice, argued the cause for respondent. With them on the briefs were *Lois Schiffer,* Assistant Attorney General, *Anthony F. Guadagno* and *Michael W. Thrift,* Attorneys, United States Environmental Protection Agency.

Jill E. Grant argued the cause for intervenors Gila River Indian Community, et al. With her on the brief were *William W. Quinn* and *Jeanette Wolfley. Reid P. Chambers* entered appearances.

Before: Edwards, *Chief Judge,* Ginsburg and Rogers, *Circuit Judges.*

Opinion for the Court filed by *Chief Judge* Edwards.

Opinion concurring in part and dissenting from Part II.A. filed by *Circuit Judge* Ginsburg.

Edwards, *Chief Judge:* In 1990, Congress passed a compendium of amendments to the Clean Air Act ("CAA" or "the Act"). This case concerns those amendments that specifically address the power of Native American nations

(or "tribes") to implement air quality regulations under the Act. Petitioners challenge the Environmental Protection Agency's ("EPA" or "the Agency") regulations, promulgated in 1998, implementing the 1990 Amendments. *See* Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (1998) (to be codified at 40 C.F.R. pts. 9, 35, 49, 50, and 81) ("Tribal Authority Rule"). Petitioners' principal contention is that EPA has granted too much authority to tribes.

Petitioners' primary challenges focus on two issues. The first is whether Congress expressly delegated to Native American nations authority to regulate air quality on all land within reservations, including fee land held by private landowners who are not tribe members. The second is whether EPA has properly construed "reservation" to include trust lands and Pueblos.

Petitioners also raise several other challenges to the Tribal Authority Rule. They argue: (1) that EPA violated the Act in authorizing tribes to administer programs affecting non-reservation "allotted lands" and "dependent Indian communities"; (2) that EPA unlawfully declined to accept public comments on applications to regulate by Native American nations; (3) that EPA improperly held that the 1990 Amendments abrogated preexisting contracts under which tribes agreed not to regulate certain privately-held land; and (4) that EPA improperly interpreted the 1990 Amendments to exempt Native American nations from certain of the Act's judicial review requirements.

We find petitioners' challenges to be mostly meritless. We hold that the Agency did not err in finding delegated authority to Native American nations to regulate all land within reservations, including fee land owned by

nonmembers. We also uphold EPA's construction of "reservation" to include trust lands and Pueblos. Likewise, we reject the challenge to the Agency's decision to exempt Native American nations from some of the Act's judicial review requirements. Petitioners' complaint regarding the adequacy of public comment on tribal applications is moot. And petitioners' claim that EPA has abrogated preexisting agreements not to regulate is unripe for review, as is one of petitioners' arguments challenging the Agency's decision on the Act's judicial review requirements.

I. BACKGROUND

A. *Statutory Background*

The Act establishes a framework for a federal-state partnership to regulate air quality. The provisions of the 1990 Amendments under review, fairly read, constitute an attempt by Congress to increase the role of Native American nations in this partnership. There are three areas of regulation under the Act particularly relevant to this case.

First, the Act grants states primary responsibility for assuring that air quality meets national standards. *See* 42 U.S.C. § 7407(a) (1994). States meet this burden by submitting state implementation plans ("SIPs") that "provide[ ] for implementation, maintenance, and enforcement" of these standards. *Id.* § 7410(a)(1) (1994). SIPs must be approved by the Agency before they may be federally enforced. In 1990, § 7410 was amended to authorize Native American nations to submit tribal implementation plans ("TIPs") "applicable to all areas . . . located within the exterior boundaries of the reservation." *Id.* § 7410(o).

Second, the Act permits states and Native American nations to "redesignate" lands pursuant to the Act's Prevention of Significant Deterioration ("PSD") program. *See id.* § 7474(a), (c) (1994). Under the PSD program, land is classified as Class I, II, or III. The land's classification determines the maximum allowable increase over the baseline by which concentrations of sulfur dioxide and other particulate matter shall not be exceeded. *See id.* § 7473 (1994). Land may, under certain circumstances, be redesignated as Class I, II, or III. *See id.* § 7474(a). Since 1977, Native American nations have had authority to redesignate land "within the exterior boundaries of reservations." *Id.* § 7474(c).

Finally, under Title V of the Act, states must develop a comprehensive permitting program applicable to major air pollution sources. *See id.* § 7661a (1994). The Agency must approve the permitting program; if none is approved, EPA must promulgate a permitting program that will be federally enforceable. *See id.* § 7661a(d)(3). One of the requirements for approval is that the program provide for judicial review of permitting actions. *See id.* § 7661a(b)(6), (7). Petitioners claim that the Agency has improperly interpreted the 1990 Amendments to give Native American nations the possibility of exemption from some portions of the judicial review requirements.

Importantly, the 1990 Amendments added language to the Act granting EPA the "author[ity] to treat Indian tribes as States under this chapter," *id.* § 7601(d)(1)(A) (1994), provided tribes meet the following requirements:

> (A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

> (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
>
> (C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

Id. § 7601(d)(2).

The 1990 Amendments also directed EPA to promulgate regulations "specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States." *Id.* If the Agency "determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible," EPA may announce other ways for the Agency to administer the program "so as to achieve the appropriate purpose." *Id.* § 7601(d)(4).

B. *The Challenged Rule*

On August 25, 1994, EPA proposed rules to implement the 1990 Amendments. *See* Proposed Tribal Authority Rule, 59 Fed. Reg. 43,956 (1994) (proposed Aug. 25, 1994). On February 12, 1998, after receiving and responding to public comments, EPA issued the final Tribal Authority Rule. *See* Tribal Authority Rule, 63 Fed. Reg. at 7254. The Agency first found that the 1990 Amendments constitute a delegation of federal authority to regulate air quality to Native American nations within the boundaries of reservations, regardless of whether the land is owned by the tribes. *See id.* The Agency

read the statute to support this "territorial view of tribal jurisdiction," authorizing a "tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land." *Id.* EPA believed that this "territorial approach . . . best advances rational, sound, air quality management." *Id.* at 7255. Thus, the Agency determined that Congress delegated to tribes the authority to regulate air quality in areas within the exterior boundaries of a reservation.

The Act does not define "reservation" for the purposes of tribal regulation. EPA interpreted "reservation" to include "trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation." *Id.* at 7258. The Agency explained that this interpretation was consistent with the Supreme Court's definition of "reservation" in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498* U.S. 505 (1991). EPA held that it would decide on a case-by-case basis whether other types of land may be considered "reservations" under the Act. *See* Tribal Authority Rule, 63 Fed. Reg. at 7258.

For areas not within a "reservation," the Agency determined that a tribe would be allowed to regulate such areas if the tribe could demonstrate inherent jurisdiction over the particular non-reservation area under general principles of federal Indian law. *See id.* at 7259. This means that tribes may propose air quality regulations in "allotted land" and "dependent Indian communities" provided they can otherwise demonstrate inherent jurisdiction over these areas. Allotted land is land "owned by individual Indians and either held in trust by the United States or subject to a statutory restriction on alienation." Felix S. Cohen, Handbook of Federal Indian Law 40 (1982). Dependent Indian

communities include "those tribal Indian communities under federal protection that did not originate in either a federal or tribal act of 'reserving,' or were not specifically designated a reservation." *Id.* at 38.

Some commenters claimed that the Act precludes tribal regulation in the form of TIPs in non-reservation areas. These parties argued that the section of the Act authorizing TIPs includes a specific provision limiting such regulation within reservations lands. *See 42* U.S.C. § 7410(o) (providing that TIPs "shall become applicable to all areas . . . located within the exterior boundaries of the reservation"). EPA, however, interpreted *"reservation"* in § 7410(o) to be "simply a description of the type of area over which a TIP may apply," and ruled that "the provision was [not] intended to limit the scope of TIPs to reservations." Tribal Authority Rule, 63 Fed. Reg. at 7259. EPA's ruling was informed by § 7601(d)(1) under which the Agency "decided to include most of the provisions of [§ 7410] in the group of provisions for which treatment of tribes in the same manner as a state is appropriate." *Id.*

The final aspect of the Tribal Authority Rule under review relates to the provisions covering judicial review of permitting programs. Title V of the Act authorizes regulating authorities to establish permitting programs for pollution sources. Section 7661a(b)(6) requires the authority to afford "an opportunity for judicial review in State court of the final permit action." 42 U.S.C. § 7661a(b)(6). In its proposed rule, EPA indicated an intention to treat tribes like states with respect to judicial review. *See* Proposed Tribal Authority Rule, 59 Fed. Reg. at 43,972. In its final rule, EPA withdrew this proposal, requiring instead that, for Title V programs, tribes must meet all of the requirements of § 7661a(b)(6) and (7) "except those provisions that specify that review of final

action under the Title V permitting program be 'judicial' and 'in State court.'" Tribal Authority Rule, 63 Fed. Reg. at 7261. EPA adopted this provision in response to concerns over tribal sovereign immunity. *See Id.* Thus, EPA indicated its willingness "to consider alternative options, developed and proposed by a tribe in the context of a tribal CAA Title V program submittal, that would not require tribes to waive their sovereign immunity to judicial review but, at the same time, would provide for an avenue for appeal of tribal government action or inaction to an independent review body and for injunctive-type relief to which the Tribe would agree to be bound." *Id.* at 7262.

Petitioner Arizona Public Service Company ("APS") filed a petition for review on April 10, 1998. The remaining petitions for review were filed shortly thereafter; the petitions were subsequently consolidated for consideration by this court.

II. ANALYSIS

Petitioners raise several challenges to EPA's final rule. First, petitioners claim that the 1990 Amendments cannot be interpreted to constitute an express delegation of authority to Native American nations to regulate privately owned fee land located within a reservation. Second, petitioners argue that EPA impermissibly interpreted the word "reservation" to include lands held in trust and Pueblos. Third, petitioners contend that EPA impermissibly interpreted the Act to permit Native American nations to issue TIPs and redesignations for land outside the boundaries of a reservation. Fourth, petitioners assert that EPA has failed to allow public comment on tribal applications to issue regulations under the Act. Fifth, petitioners argue that EPA's interpretation of the 1990 Amendments effectively abrogates preexisting

agreements between tribes and regulated industry. Finally, petitioners contend that EPA's final rule covering judicial review procedures for Title V programs was promulgated with insufficient notice to affected parties and that it rests on an impermissible interpretation of the Act.

We analyze EPA's interpretation of the Act under familiar principles. "Where congressional intent is ambiguous, . . . an agency's interpretation of a statute entrusted to its administration is entitled to deference, so long as it is reasonable." *Shell Oil Co. v. EPA,* 950 F.2d 741, 747 (D.C. Cir. 1992) (per curiam) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984)). Our primary concern under *Chevron* is to ensure that an agency acts within the bounds of congressional delegation. "[A]s long as the agency stays within [Congress'] delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference." *Arent v. Shalala,* 70 F.3d 610, 615 (D.C. Cir. 1995).

In evaluating the extent of congressional delegation, a reviewing court first exhausts the traditional tools of statutory construction to determine whether a congressional act admits of plain meaning. *See Bell Atlantic Tel. Cos. v. FCC,* 131 F.3d 1044, 1047 (D.C. Cir. 1997). If, in light of its text, legislative history, structure, and purpose, a statute is found to be plain in its meaning, "then Congress has expressed its intention as to the question, and deference is not appropriate." *Id.* If congressional intent is ambiguous, then we move to the second step of the *Chevron* analysis, and uphold an agency's interpretation if it is reasonable. The reasonableness prong includes an inquiry into whether the agency reasonably filled a gap in the statute left by Congress. *See United Techs. Corp. v. EPA,* 821 F.2d 714, 723 (D.C.

Cir. 1987) (upholding filling of gap that is rational and "not inconsistent" with amendments to the Resource Conservation and Recovery Act of 1976).

A. *Express Delegation of Authority to Native American Nations*

It is undisputed that Native American nations retain significant sovereign power. Native American nations have inherent power to determine forms of tribal government, to determine tribal membership, to make substantive criminal and civil laws governing internal matters, to administer tribal judicial systems, to exclude others from tribal lands, and, to some extent, to exercise civil jurisdiction over nonmembers, including non-Indians. *See* Cohen, Handbook of Federal Indian Law, at 247-53; *Montana v. United* States, 450 U.S. 544, 564 (1981). It is this last category of power that is at issue in the instant case, because petitioners claim that the 1990 Amendments to the Act do not authorize tribes to administer the Act over fee land within a reservation that is owned by nonmembers. As the Supreme Court has held,

> exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Montana, 450 U.S. at 564.

There is no doubt that tribes hold "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Id.* at 565. For instance, if the behavior of non-Indians on fee lands within the reservation "threatens or has some direct

effect on the political integrity, the economic security, or the health or welfare of the tribe," the tribe may regulate that activity. *Id.* at 566. To satisfy this standard, however, a tribe must show, on a case-by-case basis, that the disputed activity constitutes a "demonstrably serious" impact that "imperil[s] the political integrity, the economic security, or the health and welfare of the tribe." *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408, 431 (1989) (plurality opinion). EPA suggests, not implausibly, that "inherent sovereign power" may apply to tribal regulation under the Act of fee lands within a reservation, *see* Proposed Tribal Authority Rule, 59 Fed. Reg. at 43,598 n.5, but the Agency does not press this argument on appeal. Rather, EPA contends that the 1990 Amendments constitute an express congressional delegation to the tribes of the authority to regulate air quality on fee lands located within the exterior boundaries of a reservation.

"There are few examples of congressional delegation of authority to tribes." Cohen, Handbook of Federal Indian Law, at 253. However, as is the case in any situation in which we are called upon to find congressional intent in construing a contested statute, we start with traditional sources of statutory interpretation, including the statute's text, structure, purpose, and legislative history. *See, e.g., Block v. Community Nutrition Inst.,* 467 U.S. 340, 345 (1984) ("Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."). Our review of the CAA indicates that EPA's interpretation comports with congressional intent.

Section 7601(d), in pertinent part, authorizes EPA to treat otherwise eligible tribes as states if "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B). The statute's clear distinction between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction" carries with it the implication that Congress considered the areas within the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction. Thus, EPA correctly interpreted § 7601(d) to express congressional intent to grant tribal jurisdiction over nonmember owned fee land within a reservation without the need to determine, on a case-specific basis, whether a tribe possesses "inherent sovereign power" under *Montana*.

Petitioners do not dispute that an important purpose of the Act is to ensure *effective* enforcement of clean air standards. Obviously, this is best done by allowing states and tribes to establish uniform standards within their boundaries. As EPA explained in its proposed rule,

> [a]ir pollutants disperse over areas several and sometimes even hundreds of miles from their source of origin, as dictated by the physical and chemical properties of the pollutants at issue and the prevailing winds and other meteorological conditions. The high mobility of air pollutants, resulting areawide effects and the seriousness of such impacts, underscores the undesirability of fragmented air quality management within reservations.

Proposed Tribal Authority Rule, 59 Fed. Reg. at 43,959.

Accepting petitioners' interpretation of the 1990 Amendments would result in a "checkerboard" pattern of regulation within a reservation's boundaries that would be inconsistent with the purpose and provisions of the Act. Indeed, the Supreme Court has condemned such an approach. *See Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 479 (1976) (rejecting checkerboard approach in interpreting § 6 of the General Allotment Act, 25 U.S.C. § 349); *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 358 (1962) (terming "impractical" a pattern of checkerboard jurisdiction under 18 U.S.C. § 1151).

Finally, we note that the legislative history of the 1990 Amendments supports EPA's interpretation. As originally introduced, 42 U.S.C. § 7601(d) differed in significant respect from the final adopted version. The original § 7601(d)(2)(B) provided that treatment of tribes as states was authorized if "the functions to be exercised by the Indian tribe are *within the area of the tribal government's jurisdiction.*" S. 1630, 101st Cong. § 113(a) (1990), *reprinted in* Senate Comm. On Env't and Pub. Works, 103D Cong., Legislative History of the Clean Air Act Amendments of 1990, at 4283 (1993) (emphasis added); *see also* H.R. 2323, 101st Cong. § 604 (1989), *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 4101. The statute as finally enacted, however, treats tribes and states as equivalent if the tribe is to exercise functions "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B).

Thus, Congress moved from authorizing tribal regulation over the areas "within the tribal government's jurisdiction" (an admittedly general category) to a bifurcated classification

of all areas within "the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction." This change strongly suggests that Congress viewed all areas within "the exterior boundaries of the reservation" to be "within the area of the tribal government's jurisdiction." The change also indicates that Congress knew how to draft the 1990 Amendments to support petitioners' interpretation. The fact that Congress specifically rejected language favorable to petitioners' position and enacted instead language that is consistent with EPA's interpretation only strengthens our conclusion that the Agency has correctly ascertained Congress' intent in passing the 1990 Amendments.

The dissent's contrary contentions regarding the meaning of the 1990 Amendments do not cause us to question this conclusion. The dissent's argument that Congress would not use a "never-before-attempted" formulation to accomplish an express delegation when it could use the "formulaic 'notwithstanding' proviso [used in § 7410(o)]—the gold standard for such delegations," cannot carry much weight. Dissent Op. at 5-6. That a provision uses a new formulation is not dispositive of the question as to whether it constitutes an express delegation. Indeed, it is noteworthy that, in construing 33 U.S.C. § 1337(h)(1), which uses the dissent's so-called "gold standard," EPA has declined to find an express delegation in such language. We can assume that Congress was aware of EPA's contemporaneous interpretation of the Clean Water Act, first proposed in 1989 (while Congress contemplated the 1990 Amendments). *See* Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098, 39,101 (1989) (proposed Sept. 22, 1989) (to be codified at 40 C.F.R. pt. 131) ("EPA may treat an Indian Tribe as a State . . . only where the Tribe already possesses and can adequately demonstrate authority to manage and

protect water resources within the borders of the reservation. The Clean Water Act . . . does not grant additional authority to Tribes."). Thus, Congress' failure to use the same language in § 7601(d) does not at all imply that it meant to avoid delegation to the tribes; rather, it may suggest just the opposite.

The dissent's argument resting on Congress' omission of a "literal delegation" to tribes is seductive, but, ultimately, also unconvincing. It is true that, as originally introduced, the bills in the Senate and the House contained language providing that "the Administrator . . . may delegate to [ ] tribes [that the Administrator is authorized to treat as States] primary responsibility for assuring air quality and enforcement of air pollution control." H.R. 2323, 101st Cong. § 604 (1989), *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 4101. The absence of this language from the final bill, however, does not compel the dissent's conclusion that Congress "specifically rejected" language favorable to EPA's position. Neither the majority nor the dissent can call upon determinative legislative history to illuminate the motivations behind this unexplained change to the provisions at issue. We suggest, however, that there are at least two other explanations that account for the absence of the cited language from the final bill. First, Congress simply may have deemed the language to be redundant and confusing in light of § 7601(d)(2)(B). It would have been redundant because § 7601(d)(2)(B) already accomplishes an express delegation. It would have been confusing because the omitted language can be read to apply to areas both outside and inside the boundaries of the reservation, and, as we hold, Congress intended to expressly delegate only with respect to areas within the boundaries of a reservation.

Second, the language contained in the original bills hardly represents, as the dissent declares *ipse dixit,* a "literal delegation." Providing that the "Administrator . . . may delegate" authority to tribes reads less like an express delegation from Congress to the tribes than a permissive instruction to the Administrator. Moreover, the omitted language did not expressly expand tribal jurisdiction to include those areas within the boundaries of a reservation owned by non-members—which is what is necessary for express delegation—as does the language in the adopted § 7601(d)(2)(B). In other words, the language used in the progenitors to § 7601(d) that the dissent claims is a "literal delegation" is not easily manipulated to fit the contours of the traditional express delegation inquiry. We also note, as an aside, that by treating the original bills' language as an express delegation, our colleague seemingly abandons the "gold standard" that he claims Congress consistently has utilized expressly to delegate authority to Indian tribes. In short, we take more from the language used in the adopted § 7601(d)(2)(B) than from the language omitted.

What little precedent there is addressing express delegations of authority to Native American nations in other contexts supports our interpretation of § 7601(d). In *United States v. Mazurie,* the Supreme Court reviewed 18 U.S.C. § 1161 and concluded that the statute was an express delegation to tribes of the authority to regulate alcohol transactions. 419 U.S. 544, 556-57 (1975). The Court reaffirmed this holding almost a decade later. *See Rice v. Rehner,* 463 U.S. 713, 728-29 (1983). Section 1161 provides in pertinent part that various federal liquor laws applicable to transactions within Indian country shall not apply

> within any area of Indian country provided such act or transaction is in conformity both with the laws of the

> State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

18 U.S.C. § 1161 (1994). The Court read this language to make

> clear that Congress contemplated that its absolute but not exclusive power to regulate Indian liquor transactions would be delegated to the tribes themselves, and to the States, which historically shared concurrent jurisdiction with the Federal Government in this area.

Rehner, 463 U.S. at 728-29.

The decisions in *Mazurie* and *Rehner are* significant because the Court found an express delegation despite the absence of any "we hereby delegate" language in the statute. The Court did not find any precise language of delegation in the disputed statute, but, rather, rested on the implication inherent in recognizing the power of tribes to adopt an ordinance pertinent to liquor transactions on Indian country. *See Rehner, 463* U.S. at 730-31. Similarly, in this case, we find an express congressional delegation from the implication inherent in the distinction between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction."

Petitioners claim that the 1990 Amendments delegate authority to EPA to approve state or tribal air quality programs for federal enforcement, not authority to tribes to "adopt regulatory programs that the tribes could not adopt

under tribal and federal Indian law prior to the 1990 Amendments." Br. for Petitioners National Ass'n of Mfrs. ("NAM") at 23. Petitioners' claim misses a crucial point, however, that there are two different powers at issue here: (1) the authority to regulate and (2) the derivative authority to enforce specific provisions of the Act. Petitioners focus on the derivative authority. Of course the 1990 Amendments do not constitute an express delegation to the tribes to enact regulatory provisions absent any federal oversight or approval. Rather, the 1990 Amendments simply establish the palette with which tribes are permitted to paint their regulatory picture.

Petitioners additionally argue that although states are authorized under 42 U.S.C. § 7407(a) to enact programs "within the entire geographic area comprising such State," EPA has never interpreted this provision as allowing states to promulgate air quality regulations applicable to Native American reservations located within a state's geographic area. In other words, petitioners claim that because states may not promulgate regulations affecting Native American reservations, tribes may not promulgate regulations covering lands held in fee by persons other than tribal members. This argument is obviously flawed, because it fails to recognize that the relationship between fee holders and tribes is quite different from the relationship between tribes and states. As the Supreme Court noted in *Mazurie*,

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are "a separate people" possessing "the power of regulating their internal and social relations . . . ."

419 U.S. at 557 (citations omitted). And there is no doubt

that Congress may delegate authority to tribes "even though the lands [are] held in fee by non-Indians, and even though the persons regulated [are] non-Indians." *Id.* at 554.

Finally, petitioners note that the Agency declined to find an express delegation of power to regulate fee lands under §§ 518(e) and (h) of the Clean Water Act; this is noteworthy to petitioners, because they can glean no difference between the cited provisions under the Clean Water Act and the disputed provisions in this case under the Clean Air Act. We find no merit in this argument. The Clean Water Act states that "[t]he Administrator is authorized to treat an Indian tribe as a State . . . if . . . the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe . . . within the borders of an Indian reservation." 33 U.S.C. § 1377(e)(2) (1994). "Reservation" is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." *Id.* § 1377(h)(1). In construing these provisions, EPA concluded that because the legislative history was "ambiguous and inconclusive," it would not find that the Clean Water Act expanded or limited the scope of tribal authority beyond that inherent in the tribe. Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (1991) (codified at 40 C.F.R. pt. 131).

The situation here is quite different from what EPA found with respect to the Clean Water Act. Although the disputed language in the Clean Air Act and the Clean Water Act is somewhat similar, it is far from identical. As noted above, EPA correctly relied on the CAA's clear distinction between areas "within the exterior boundaries of the reservation" and

"other areas within the tribe's jurisdiction" to find a congressional intention to define the areas within the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction. Furthermore, as we have already indicated, the legislative history of the 1990 Amendments plainly supports EPA's interpretation. Thus, the legislative history underlying the Clean Air Act is not "ambiguous and inconclusive," as was found to be the case with respect to the Clean Water Act.

It is also of some significance that EPA's interpretation of the Clean Water Act never has been subject to judicial review on the question of the presence or absence of an express delegation to tribes to regulate fee lands within the bounds of reservations. One federal court has observed, in *dicta*, that "the statutory language [in the Clean Water Act] seems to indicate plainly that Congress did intend to delegate . . . authority to tribes." *State of Montana v. EPA*, 941 F. Supp. 945, 951 (D. Mont. 1996). The court noted, however, that in construing the provisions of the Clean Water Act, "EPA determined that it would take the more cautious view, that Congress did not expressly delegate jurisdiction to tribes over non-Indians and that tribes would have to prove on a case-by-case basis that they possess such jurisdiction." *Id.* at 952. There was no reason for EPA to take a similarly "cautious view" with respect to the Clean Air Act, because the language and legislative history of the 1990 Amendments differ from that of the Clean Water Act.

B. *EPA's Interpretation of "Reservation"*

Given that EPA correctly interpreted § 7601(d) to expressly delegate jurisdiction to otherwise eligible tribes over all land within the exterior boundaries of reservations, including fee land, the next question is what areas are

covered by a "reservation." EPA interprets "reservation" as used in three different statutory provisions (42 U.S.C. §§ 7410(o), 7474(c), 7601(d)(2)(B)) to mean formally designated reservations as well as "trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation." Tribal Authority Rule, 63 Fed. Reg. at 7258. This includes what EPA terms "Pueblos" and tribal trust land. Pueblos are villages, primarily located in New Mexico, held by tribes in communal fee-simple ownership, originally acquired under grants from Spain and Mexico, and confirmed by Congress in the late 1800s. *See United States v. Sandoval*, 231 U.S. 28, 38-39 (1913). Petitioners ignore the status of Pueblos and concentrate their attack on EPA's interpretation of "reservation" to include tribal trust land.

The Secretary of the Interior is authorized to acquire land in trust for a tribe under 25 U.S.C. § 465 (1994), and such land can only formally be designated a reservation via the process provided by 25 U.S.C. § 467 (1994). Petitioners claim that EPA's interpretation contravenes the Act's plain language and renders 25 U.S.C. § 467 superfluous by ignoring the distinction between "trust lands" and "reservations." EPA counters that the statute is ambiguous, and that its reasonable interpretation is entitled to *Chevron* deference.

We start with *Chevron* step one and rely on traditional principles of statutory construction to determine whether EPA's interpretation contravenes congressional intent as manifested by the 1990 Amendments. Significantly, the Act nowhere defines "reservation." Therefore, we look to the term's ordinary and natural meaning, and the context in which the term is used. *See Smith v. United States*, 508 U.S. 223, 228-30 (1993). And we must remain cognizant of the

rule that courts construe federal statutes liberally to benefit Native American nations. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

The dictionary defines "reservation" to be a "tract of public land set aside for a particular purpose (as schools, forest, or the use of Indians)." WEBSTER'S THIRD NEW INT'L DICTIONARY 1930 (1993). This definition surely encompasses both trust lands and formally designated reservations. Nothing in the United States Code is clearly to the contrary, for the term "reservation" has no rigid meaning as suggested by petitioners. *See* 7 U.S.C. § 1985(e)(1)(A)(ii) (Supp. IV 1998) (defining "reservation" to include land "within the limits of any Indian reservation under the jurisdiction of the United States, . . . trust or restricted land located within the boundaries of a former reservation of a federally recognized Indian tribe in the State of Oklahoma[,] . . . [and] all Indian allotments the Indian titles to which have not been extinguished if such allotments are subject to the jurisdiction of a federally recognized Indian tribe"); *id.* § 2012(j) (1994) (defining "reservation" as "the geographically defined area or areas over which a tribal organization . . . exercises governmental jurisdiction"); 25 U.S.C. § 1452(d) (1994) (defining "reservation" to include Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act); *id.* § 1903(10) (1994) (defining "reservation" to be "Indian country as defined in section 1151 of Title 18" and any trust land not encompassed by § 1151); *id.* § 3103(12) (1994) ("'[R]eservation' includes Indian reservations established pursuant to treaties, Acts of Congress or Executive orders, public domain Indian allotments, and former Indian reservations in Oklahoma"); 33

U.S.C. § 1377(h)(1) (defining "Federal Indian reservation" to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation").

These varying definitions of "reservation" lay to waste petitioners' argument. Petitioners appear to assert that, in the absence of any specific definition, "reservation" as used in the 1990 Amendments to the Act can only mean the formal reservation contemplated by 25 U.S.C. § 467. This is a specious contention. First, § 467 does not purport to offer an exclusive definition of "reservation"; it simply defines the terms under which federal land is formally designated a reservation. Second, if Congress had wanted to limit the term "reservation" as petitioners suggest, Congress could have done so. Indeed, Congress on many occasions has defined "reservation" in terms of other statutes. *See* 12 U.S.C. § 4702(11) (1994) (defining "reservation" according to 25 U.S.C. § 1903(10)); 22 U.S.C. § 2124c(m)(1) (1994) (defining "Indian reservation" with reference to 25 U.S.C. § 1452(d)); 25 U.S.C. § 1903(10) (defining "reservation" with reference to 18 U.S.C. § 1151, as well as trust land); 26 U.S.C. § 168(j)(6) (1994 & Supp. III 1997) (defining "Indian reservation" with reference to 25 U.S.C. § 1452(d) and 25 U.S.C. § 1903(10)); 42 U.S.C. § 10101(19) (1994) (defining "reservation" to include communities referred to in 18 U.S.C. § 1151(a), (b)); *id.* § 11332(a)(1994) (defining "reservation" according to 25 U.S.C. § 1452(d)). Moreover, given the varying definitions of the term used throughout the Code, it would be a curious result indeed for this court to insist that the absence of a definition requires EPA to advance the most restrictive definition as put forth by petitioners.

Aside from the statute's plain meaning and its context, other sources of statutory interpretation offer no insight into congressional intent with respect to the meaning of "reservation." The Report of the Senate Committee on Environment and Public Works refers to the authority of Indian tribes to "administer and enforce the Clean Air Act in Indian lands," as well as enforcement of the Act in "Indian country." S. REP. No. 101-228, at 79, 80 (1989), *reprinted in* LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS of 1990, at 8419-20. These terms are arguably broader than the definition of "reservation" urged by petitioners, and simply confirm the term's ambiguity as used by Congress.

Accordingly, we turn to step two of the *Chevron* inquiry. That is, did the Agency reasonably interpret the term "reservation" to include formal reservations, Pueblos, and trust lands? EPA supported its interpretation of "reservation" by looking to relevant case law, in particular Supreme Court precedent holding that there is no relevant distinction between tribal trust land and reservations for the purpose of tribal sovereign immunity. *See Oklahoma Tax Comm'n, 498* U.S. at 511. This view is consonant with other federal court holdings that an Indian reservation includes trust lands. *See United States v. John*, 437 U.S. 634, 649 (1978) (finding "no apparent reason" why lands held in trust should not be considered a "reservation" under § 1151(a)); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249-54 (10th Cir. 2000) (same); *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986) (considering tribal trust land to be Indian country under either § 1151(a) as a "*de facto*" reservation or § 1151(b) as a dependent Indian community); *United States v. Sohappy*, 770 F.2d 816, 822-23 (9th Cir. 1985) (holding that trust land is a "reservation" under § 1151(a)).

Petitioners note that, for several years, EPA has defined reservation, for the purposes of the PSD program, to be "any federally recognized reservation established by Treaty, Agreement, executive order, or act of Congress." 40 C.F.R. 52.21(b)(27) (1999). Given the Agency's reasoned justification for a broader definition of "reservation" in the Tribal Authority Rule, and its proposal to amend the PSD definition to ensure consistency with the Tribal Authority Rule, EPA's departure from the PSD definition does not preclude this court from upholding EPA's new definition. In light of the ample precedent treating trust land as reservation land in other contexts, and the canon of statutory interpretation calling for statutes to be interpreted favorably towards Native American nations, we cannot condemn as unreasonable EPA's interpretation of "reservations" to include Pueblos and tribal trust land.

C. *Areas over which Tribes May Exercise Jurisdiction to Propose TIPs and Redesignations*

The next issue that arises in this case is whether EPA defensibly interprets the extent of Native American authority to redesignate geographic areas and propose TIPs under the Act. Native American nations are authorized to redesignate "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes." 42 U.S.C. § 7474(c). Similarly, Indian tribes may submit TIPs "applicable to all areas . . . located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." 42 U.S.C. § 7410(o).

EPA interpreted both of these provisions to authorize tribal redesignation and implementation of TIPs not just within the limits of reservations (including trust lands and

Pueblos), but also within allotted lands and dependent Indian communities. No one argues that allotted lands and dependent Indian communities are within the compass of a "reservation." Instead, EPA contends that so long as a tribe demonstrates inherent jurisdiction over non-reservation areas, it may issue redesignations and TIPs for those lands. In other words, although tribes do not have express delegated authority to issue redesignations and TIPs for non-reservation areas, neither does the Act bar tribes from acting on a case-by-case basis pursuant to demonstrated inherent sovereign power.

Petitioners contend that both § 7474(c) and 7410(o) operate as geographical limitations on the power of tribes to redesignate areas and issue TIPs. Petitioners' argument with respect to § 7474(c) falls flat. This provision says that "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." 42 U.S.C. § 7474(c). Petitioners seek to twist this language into the following: "Indian tribes may only redesignate lands within the exterior boundaries of reservations." All § 7474(c) establishes, however, is the exclusive power of Indian tribes to redesignate land within a reservation; it does not address the inherent power of tribes to redesignate land in non-reservation areas.

Nor do petitioners fare better with respect to § 7410(o), which states that EPA-approved TIPs "shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." 42 U.S.C. § 7410(o). Petitioners read this to mean that EPA may only approve a TIP if it applies within reservation areas.

As EPA points out, petitioners' interpretation cannot stand for several reasons. First, § 7410(o) cross-references § 7601(d), which allows for tribes to exercise jurisdiction over reservation areas or "other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B). Most importantly, § 7410(o) provides that TIPs apply to all areas within the borders of a reservation once the plan "becomes effective in accordance with the regulations promulgated under section 7601(d) of this title." 42 U.S.C. § 7410(o). Therefore, it is permissible for EPA to give § 7410(o) the reading it proffers: a reinforcement of tribes' jurisdiction to implement TIPs in reservation land. Petitioners would instead read the statute as an express limitation of tribal jurisdiction. Under step one of *Chevron*, we cannot say that congressional intent is free of ambiguity on this question.

Accordingly, we turn to whether EPA's interpretation is reasonable. We believe that it is undoubtedly so. To read the statute otherwise would result in several anomalies. First, EPA notes without dispute that petitioners' interpretation would allow a state's implementation plan to apply to non-reservation areas, even where a tribe has demonstrated inherent jurisdiction over those areas. Second, petitioners' reading would disable a tribe from comprehensively administering the Act. A tribe could implement, in non-reservation areas, new source performance standards under the Act, but not administer a TIP, even though the regulated activity "threatens or has some direct effect on the . . . health or welfare of the tribe." *Montana*, 450 U.S. at 566. EPA's reading of the statute to allow such regulation is a reasonable interpretation of §§ 7410(o) and 7601(d).

D. *The Right of The Public To Comment on Tribal Applications to Regulate*

EPA's final rule limited the opportunity of the public to comment directly to the Agency on "competing claims over tribes' reservation boundary assertions and assertions of jurisdiction over non-reservation areas," allowing only "appropriate governmental entities" to submit comments. Tribal Authority Rule, 63 Fed. Reg. at 7267. Petitioners challenge this limitation of the public's opportunity to comment directly to EPA. Before this court, however, EPA indicated its intent to clarify that the Agency will accept comments directly from all commenters on the determination of a tribe's eligibility to be treated as a state. *See* Br. for Respondent at 43. Subsequently, EPA issued a clarification to this effect. *See* Indian Tribes: Air Quality Planning and Management, 65 Fed. Reg. 1322, 1323 (2000).

Therefore, this issue is moot. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 458 (D.C. Cir. 1998) (finding challenge to EPA's waiver for state's program was moot where actions complained of were revised after lawsuit was filed). A dispute may be rendered moot where the complained of conduct has been voluntarily discontinued if "(1) there is no reasonable expectation that the conduct will recur and (2) 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Id.* at 459 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). In this case, there is no indication that EPA will revert to its past proposal only to receive direct comments from "appropriate governmental units," and all of the adverse effects of the Agency's alleged illegal action have been remedied by EPA's clarification.

E. Abrogation of Existing Agreements By Tribes Not to Regulate Certain Land

Petitioners argue that EPA's final rule abrogates preexisting agreements by Native American nations not to regulate certain individual parties. Specifically, petitioner APS points to its 1960 lease with the Navajo Nation that APS claims prohibits the Nation from regulating the operation of the Four Corners Power Plant. *See* Br. of Petitioner APS at 2. APS further claims that the Secretary of the Interior covenanted to protect APS from tribal regulation. *See id.* at 3.

Petitioners point to footnote 5 in the final rule which states, in response to industry comments that preexisting agreements may limit the extent of a tribe's regulatory jurisdiction, that "EPA believes that the CAA generally would supersede pre-existing treaties or binding agreements that may limit the scope of tribal authority over reservations." Tribal Authority Rule, 63 Fed. Reg. at 7256 n.5. Petitioners ignore the sentence following footnote 5, however, in which EPA states that it "will consider on a *case-by-case* basis whether special circumstances exist that would prevent a tribe from implementing a CAA program over its reservation." *Id.* at 7256 (emphasis added). EPA maintains in its brief that it has made no judgment on the scope and effect of the specific agreements to which petitioners refer, and that it will consider such questions as they arise. As counsel for APS acknowledged at oral argument, it is quite possible that the abrogation issue never will arise. For instance, if the Navajo Nation agrees that it will not regulate the Four Corners Plant, there will be no controversy in need of resolution.

There is still a concern, however. In EPA's preamble to a proposed federal implementation plan, promulgated after the Tribal Authority Rule, the Agency stated that,

> [u]pon review of the circumstances surrounding the location and operation of [the Four Corners Power Plant] on the Navajo Indian Reservation, EPA concluded that jurisdiction under the Act over this facility lies with EPA and the Navajo Nation.

64 Fed. Reg. 48,731, 48,732 (1999); *see also* 64 Fed. Reg. 48,725, 48,726 (1999) (taking same position with respect to the Navajo Generating Station). EPA now acknowledges that, to the extent these preambles imply that the Agency has determined that the indicated plants are subject to regulation by the Navajo Nation, these statements were incorrect. *See* Supp. Br. of Respondent at 4. In fact, EPA has confirmed this position by publishing an official notice in the Federal Register clearly indicating that it has not yet determined whether the Navajo Nation may regulate the indicated power plants under the Act. *See id.* at 4-5.

This issue, therefore, is not ripe for review before this court. The ripeness doctrine seeks to balance institutional interests in delaying review against litigants' interests in promptly reviewing allegedly unlawful government actions. *See Florida Power & Light Co. v. EPA,* 145 F.3d 1414, 1420—21 (D.C. Cir. 1998). First a court must ask if the disputed issues are fit for judicial review. *See Abbot Labs. v. Gardner,* 387 U.S. 136, 149 (1967). If the institutional interests of the agency or reviewing court favor postponing review, then a party must demonstrate "hardship" in order to show that the issue should nonetheless be made subject to judicial review. *See City of Houston v. HUD, 24* F.3d 1421, 1431 (D.C. Cir. 1994).

The fitness inquiry asks if a case "'presents a concrete legal dispute [and] no further factual development is essential to clarify the issues . . . [and] there is no doubt whatever that the challenged [agency] practice has "crystallized" sufficiently for purposes of judicial review.'" *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540 (D.C. Cir. 1999) (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 492-93 (D.C. Cir. 1988)) (alterations in original). Here, petitioners cannot satisfy this prong because EPA has not issued any order relating to the preexisting covenants prohibiting regulation by Native American nations. *See Florida Power & Light*, 145 F.3d at 1421 (finding lack of fitness for review where it was unclear "whether, or on what grounds, EPA would even apply" the challenged rule to petitioners).

Additionally, petitioners cannot point to any hardship they would suffer from deferred judicial review. It is axiomatic that mere delay, absent other extenuating circumstances, in adjudication of a dispute cannot satisfy the hardship prong. *See Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1205-06 (D.C. Cir. 1998); *Florida Power & Light*, 145 F.3d at 1421 (burden of participating in further proceedings does not constitute a hardship).

Contrary to petitioners' argument, this case is not on all fours with *Better Government Association v. Department of State*, 780 F.2d 86 (D.C. Cir. 1986). In *Better Government*, petitioners challenged Department of Justice regulations applied by the Department of State and the Department of the Interior to evaluate fee waiver applications for Freedom of Information Act requests. The court found that the claim was ripe for review because the departments relied on the Department of Justice guidelines, and the government agreed that the regulations "*govern*[ ] *and will continue to govern* its

decisions." *Id. at* 93. Here, EPA has made no decision that will govern its analysis of whether the preexisting agreements are abrogated by its interpretation of the Act. Until the Agency takes a position on the enforceability of the covenants not to regulate, there is no concrete issue for this court to consider.

F. Judicial Review of Tribal Permitting Programs

Under Title V of the Act, states must develop a comprehensive permitting program applicable to major air pollution sources. *See* 42 U.S.C. § 7661a. Section 7661a enunciates the requirements for administering permitting programs, including elements of judicial review. Pursuant to § 7661a,

> [t]hese elements shall include . . .
>
> (6) Adequate, streamlined, and reasonable procedures for . . . expeditious review of permit actions, . . . including an opportunity for judicial review in State court of the final permit action . . . .
>
> (7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application . . . shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

Id. § 7661a(b)(6), (7).

EPA initially proposed that tribes "will have to meet the same requirements" as states in providing an opportunity for judicial review of a final permit action. Proposed Tribal Authority Rule, 59 Fed. Reg. at 43,972. EPA withdrew this proposal in its final rule. Instead, EPA required tribes to meet all the requirements of § 7661a(b)(6) and (7) except that review of a tribe's Title V permitting program need not be "judicial" or "in State court." *See* Tribal Authority Rule, 63 Fed. Reg. at 7261. Petitioners present two challenges to the final rule on judicial review: (1) that EPA had no authority to exempt tribes from the Act's judicial review requirements; and (2) that interested parties received insufficient notice of the final rule's content.

EPA promulgated its final rule in response to comments that expressed concern over "waivers of tribal sovereign immunity to judicial review." *Id.* Some Native American representatives observed that requiring a waiver of sovereign immunity for a tribe to administer a Title V permit program would operate as a disincentive to a tribe's establishing such programs. Industry commenters also sought assurances that nonmembers of tribes would have access to tribal courts for judicial review.

EPA identified two alternatives for ensuring that "some form of citizen recourse be available for applicants and other persons affected by permits issued under tribal Title V programs." *Id.* One option was for tribes to voluntarily waive their sovereign immunity in tribal courts. A second possibility was for the Agency to consider "alternative options . . . that would not require tribes to waive their sovereign immunity to judicial review but, at the same time, would provide for an avenue for appeal of tribal government action or inaction to an independent review body and for injunctive-type relief to which the Tribe would agree to be

bound." *Id.* at 7262. EPA interpreted 42 U.S.C. § 7601(d) to "provide[ ] EPA with the discretion to balance the goals of ensuring meaningful opportunities for public participation under the CAA and avoiding undue interference with tribal sovereignty when determining those provisions for which it is appropriate to treat tribes in the same manner as states." *Id.*

Section 7601(d) authorizes EPA to treat Native American nations as states for the purposes of the Act. However, if EPA determines "that the treatment of Indian tribes as identical to states is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose." 42 U.S.C. § 7601(d)(4). EPA relies on this statutory provision to justify the approach taken on judicial review.

Petitioners argue that EPA lacks authority to exempt tribes from the judicial review requirements, because § 7601(d) does not affect the operation of CAA provisions "that define rights that must be afforded to those affected by a program in order [for either a tribe or a state] to receive EPA approval to administer a federally enforceable program." Br. for Petitioners NAM at 42. We see no merit in this claim. EPA's interpretation is not clearly contradicted by the statute. In fact, § 7601(d)(4) allows the Agency the discretion to determine whether it is "inappropriate or administratively infeasible" to treat Indian tribes exactly the same as states in administering the Act. Petitioners offer no support for their assertions that the judicial review requirements do not come within the EPA's discretion under this section. It is obvious, then, that the Agency had a choice as to whether to treat Indian tribes identical to states with

regard to the judicial review elements of § 7661a(b). The clear meaning of the statute does not foreclose the Agency's interpretation.

Nor is the Agency's interpretation unreasonable. EPA understandably was concerned that the effect of requiring tribes to submit their permitting disputes to state courts would conflict with policies supporting tribal sovereignty and also discourage the institution of tribal permitting programs. The Agency's decision to allow tribes to submit alternatives to waiving sovereign immunity accomplishes a reasonable balancing of these interests. This is bolstered by EPA's expressed intention to ensure that any alternative to a waiver of sovereign immunity nonetheless provides an impartial forum allowing for "injunctive-type relief." Tribal Authority Rule, 63 Fed. Reg. at 7262.

Petitioners also argue that, assuming that EPA could exempt tribes from judicial review requirements, § 7601(d)(4) requires that EPA provide an alternative means of ensuring effective judicial review. Petitioners suggest that EPA must at least "provide for review by the Regional Administrator of all tribal permit decisions, and resolve all federal or tribal challenges to the tribe's actions." Br. for Petitioners NAM at 44. To the extent that this argument merely reiterates the contention that EPA has no authority to alter tribes' judicial review responsibilities, nothing more need be said. To the extent that this argument challenges the alternative tribal review procedures to be approved by EPA in lieu of judicial review in state court, this issue is not ripe for review. EPA has not yet approved any alternative tribal judicial review procedures. *See* Tribal Authority Rule, 63 Fed. Reg. at 7262 ("EPA will develop guidance in the future on acceptable alternatives to judicial review."). As such,

there is no decision "fit" for judicial review, nor have petitioners demonstrated any hardship from deferred review.

Petitioners advance a separate contention in support of vacating the rule: that interested parties did not receive sufficient notice of the substance of the final rule. The Administrative Procedure Act requires that an agency publish notice of its proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (1994). An agency satisfies this notice requirement if the final rule is a "logical outgrowth" of the proposed rule. *See Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991). In other words, we consider "'whether . . . [the party], *ex ante*, should have anticipated that such a requirement might be imposed'" in determining whether adequate notice was given in a notice of proposed rulemaking. *Id.* at 446 (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)) (alterations in original).

"In most cases, if the agency . . . alters its course in response to the comments it receives, little purpose would be served by a second round of comment." *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994). Thus, the "logical outgrowth" test normally is applied to consider "whether a new round of notice and comment would provide the *first* opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Id.* (emphasis added). In this case, there was more than enough notice for interested parties to offer comments on EPA's treatment of the judicial review provisions of the Act *vis a vis* Indian tribes. The parties were not asked to "divine the EPA's unspoken thoughts." *Shell Oil Co.*, 950 F.2d at 751. And the final rule was not wholly unrelated or surprisingly distant from what EPA initially suggested. In

first proposing that tribes would have to meet the "same requirements" as states, EPA effectively raised the question as to whether this made sense. EPA's proposal was not a "bureaucratic game of hide and seek," *MCI Telecomm. Corp. v. FCC*, 57 F.3d 1136, 1142 (D.C. Cir. 1995); the proposal raised a highly visible and controversial issue and elicited responses from both tribal and industry commenters. Furthermore, any reasonable party should have understood that EPA might reach the opposite conclusion after considering public comments. In short, it is fair to say that the purpose of notice and comment rulemaking has been served, and that the Agency's change of heart on this issue only demonstrates the value of the comments it received.

III. CONCLUSION

Consistent with the foregoing opinion, we deny the petitions for review in part, and dismiss in part for want of jurisdiction and for lack of ripeness. Petitioners' motions for vacatur and remand are dismissed as moot.

* * * *

GINSBURG, *Circuit Judge*, *dissenting in part:* With certain exceptions, of which more later, an Indian tribe lacks inherent authority to regulate the conduct of a nonmember on land he owns within the boundaries of the tribe's reservation. Lacking inherent authority, a tribe may exercise regulatory authority over such non-Indian lands only by express congressional delegation. The court today determines that § 301(d)(2)(B) of the Clean Air Act, 42 U.S.C. § 7601(d)(2)(B), expressly delegates to tribes—contingent upon approval by the EPA Administrator—authority to enforce the Clean Air Act on nonmembers' lands within a reservation. Finding no such express delegation in

§ 301(d)(2)(B), I dissent from Part II.A of the opinion for the court.

I. Background

In *State of Montana v. United States*, 450 U.S. 544 (1981), the Crow tribe had sought to regulate nonmembers' hunting and fishing upon lands owned in fee by the State of Montana but lying within the boundaries of the Crow reservation. The Supreme Court, unanimous upon this point, held that a tribe generally lacks authority to regulate the conduct of nonmembers upon lands owned in fee by nonmembers ("fee lands"); of the two exceptions the Court noted, the only one arguably relevant here is that "[a] tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. Absent such a threat or effect, tribal regulation of fee lands within a reservation requires an "express congressional delegation." *Id.* at 564.

The two provisions of the Clean Air Act relevant to the question of tribal authority to enforce the Act on fee lands were added by § 107 of the 1990 Amendments, Pub. L. No. 101-549, 104 Stat. 2399, 2464. Section 301(d) of the Act, 42 U.S.C. § 7601(d), provides in relevant part:

> (1) Subject to the provisions of paragraph (2), the Administrator . . . is authorized to treat Indian tribes as States under this chapter . . .
>
> (2) The Administrator shall promulgate regulations . . . specifying those provisions of this chapter for which it is appropriate to treat Indian tribes as States.

Such treatment shall be authorized only if—

> (A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
>
> (C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

Section 110(o) of the Act, 42 U.S.C. § 7410(o), provides in its entirety:

> If an Indian tribe submits an implementation plan to the Administrator pursuant to section [301(d), above], the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section [301(d)(2)]. When such plan becomes effective in accordance with the regulations promulgated under section [301(d)], the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

The EPA's Tribal Authority Rule (TAR) allows a tribe (subject to approval by the Administrator of the EPA) to

enforce the Clean Air Act on all land within the boundaries of a reservation without having to demonstrate its inherent authority over all such land. Under the clear rule of *Montana*, however, a tribe lacks inherent sovereign authority to regulate fee lands (and rights of way, *see Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997)) within a reservation except under the aforementioned exception announced in that case. Therefore, the TAR must be set aside as contrary to law unless the 1990 Amendments expressly delegate to tribes authority over fee lands and rights of way within a reservation. Upon that starting point for analysis the parties, the court, and I agree.

The EPA claims to find a delegation of authority in § 301(d)(2)(B) of the Clean Air Act. In evaluating this claim, the court is to accord no deference to the EPA's interpretation of that section because *Montana* requires an "express congressional delegation" in order to expand tribal authority. In other words, the EPA cannot prevail merely by demonstrating that its interpretation of § 301(d)(2)(B) is reasonable: the agency's interpretation must be correct if the TAR is to stand. Therefore, although we are reviewing an EPA rule-making, on this issue the focal point for our inquiry is not the EPA's interpretation but the statute itself. Upon this methodological point, too, all agree.

II. Analysis

With these agreed upon principles in mind, it seems to me clear that the 1990 Amendments do contain an express delegation of authority over fee lands and rights of way—but not in § 301(d), which governs tribal enforcement of all Clean Air Act programs specified by the Administrator. Rather, the delegation is in § 110(o), which governs only tribal implementation plans (TIPs). Because the specific

delegatory text in § 110(o) is significant to my conclusion that § 301(d) is not a delegation, I consider § 110(o) first.

A. Section 110(o) and the "Notwithstanding" Proviso

The petitioners' convoluted argument to the contrary notwithstanding, § 110(o) is self-evidently an express congressional delegation of authority to enforce TIPs on fee lands and rights of way within a reservation: "the [TIP] shall become applicable to all areas . . . located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." The same "notwithstanding" proviso has been a feature in the only two cases in which the Supreme Court has found an express delegation of authority to tribes. In *United States v. Mazurie*, 419 U.S. 544 (1975), and in *Rice v. Rehner*, 463 U.S. 713 (1983), the Court found an express delegation of authority over fee lands within a reservation based upon two statutory provisions: 18 U.S.C. § 1161, which authorizes the tribes to enact ordinances regulating liquor in "Indian country"; and 18 U.S.C. § 1151, which defines "Indian country" to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." *See Rice*, 463 U.S. at 715 & n.1 ("Congress has delegated authority . . . in Indian country [as defined in] 18 U.S.C. § 1151"); *see also Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 428 (1989) (citing 18 U.S.C. §§ 1151 and 1161 together as an

express congressional delegation of authority over fee lands).*

B. Section 301(d)

The express congressional delegation just identified in § 110(o) cannot by itself support the TAR, however:. Because the TAR allows a tribe to enforce all applicable Clean Air Act programs—rather than just the TIP—on nonmember lands within its reservation, the EPA must demonstrate that § 301(d) likewise contains an express congressional delegation of authority.

The EPA argues the following text distilled from § 301(d) contains an express delegation to tribes of authority to regulate fee lands within a reservation:

> [T]he Administrator . . . is authorized to treat Indian tribes as States . . . . Such treatment shall be authorized only if . . . the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior

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* In a dictum, the *Brendale* Court noted as a second example of an express congressional delegation of authority §§ 518(e), (h)(1) of the Clean Water Act, 33 U.S.C. §§ 1377(e), (h)(1), the latter of which, significantly, contains the notwithstanding clause so glaringly absent from § 301(d). 492 U.S. at 428. In terms that otherwise track § 301(d) of the Clean Air Act, § 518(e) provides for conditionally treating a tribe as a state with regard to water resources "within the borders of an Indian reservation," defined in § 518(h)(1) as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." In spite of the *Brendale* dictum, the EPA has concluded § 518 is not an express congressional delegation of authority, *see* 56 Fed. Reg. 64,876, 64,880 (1991), but no court has yet resolved the issue.

> boundaries of the reservation *or* other areas within the tribe's jurisdiction.

42 U.S.C. § 7601(d)(1)-(d)(2)(B) (emphasis added). The gist of the agency's argument, which the court accepts, is that the Congress expressly delegated authority over all lands within a reservation by linking "within the exterior boundaries of the reservation" disjunctively to "other areas within the tribe's jurisdiction." For the following reasons, I do not agree.

As the petitioners emphasize, when one reads the relevant sentence as a whole—rather than focusing solely upon the last phrase—one sees that, rather than expressing a delegation of authority over fee lands and rights-of-way within a reservation, the sentence by its terms merely lays down a precondition to the Administrator's treating a tribe as a state. Even more certainly, there is no way to read the phrase deemed crucial by the court ("within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction") as an express delegation of authority.

One important indication that the Congress did not intend this phrase as an express delegation is that it used the Court-tested "notwithstanding" proviso in § 110(o) but not in § 301(d)(2)(B). Sections 110(o) and 301(d)(2)(B) were enacted at the same time, in the same section of the same bill, so the different phrasing should not be thought just an artifact of legislative haphazardry. I do not believe that the Congress, obviously aware that it could enlarge tribal authority over nonmember lands only through an express delegation, would include the formulaic "notwithstanding" proviso—the gold standard for such delegations—in the narrower of the two sections, and then use an obscure and never-before-attempted formulation to accomplish the same result in the broader of the two sections. Further, the court's

interpretation of § 301(d)(2)(B) renders the "notwithstanding" proviso in § 110(o) surplusage—a point the court euphemistically acknowledges, Slip Op. at 23 ("a reinforcement of tribes' . . . [§ 301(d)(2)(B) authority] to implement TIPs in reservation land"). If § 301(d)(2)(B) is so clear as to constitute an express congressional delegation, it is difficult to believe that the Congress would "reinforce" this point in a narrower provision enacted at the same time as and expressly cross-referencing § 301(d).*

Finding an express congressional delegation in § 301(d) is made even more difficult, as the petitioners contend, by the Congress's having deleted a literal delegation to tribes that was included in the corresponding section of the bills by which the 1990 Amendments were first introduced in the House and the Senate: "the Administrator . . . may delegate to [ ] tribes primary responsibility for assuring air quality and enforcement of air pollution control." H.R. 2323, 101st Cong. § 604, *reprinted in* 2 Legislative History of the Clean Air Act

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* The court suggests the Congress may well have intentionally avoided using the "notwithstanding" proviso in § 301(d) in response to the EPA's having interpreted § 518 of the Clean Water Act as not being a delegation. Slip Op. at 13. The EPA's interpretation of the CWA was not adopted, however, until December 1991, more than a year after enactment of the 1990 Amendments. *See* 56 Fed. Reg. 64,876, 64,880. I am not willing blithely to "assume that Congress was aware of," much less responded to, the EPA's mere proposal to adopt that interpretation. When the 1990 Amendments were enacted, the EPA's unexplained proposal was still subject to change in the light of public comments, and even if finally adopted would not receive deference from a reviewing court charged with determining whether the Congress had made an express delegation to tribes. In contrast, we know for a certainty that the Congress was aware of *Brendale*, in which the Supreme Court instanced CWA § 518(h)(1) as an express congressional delegation: That case had been decided in June 1989, and is cited in the Senate Report on an earlier version of the 1990 Amendments, *see* S. Rep. No. 101-228, at 79.

Amendments of 1990, at 4053, 4101 (1993) *[hereinafter* 1990 Leg. Hist.]; S. 1630, 101st Cong. 111, *reprinted in* 5 1990 Leg. Hist. 9050, 9145. The Senate passed S. 1630 with this express delegation intact; the House, however, did not act upon H.R. 2323 but instead passed H.R. 3030, in which the delegation provision did not appear. *See* 2 1990 Leg. Hist. 1809, 1972-73 (House passage of S. 1630, amended in the nature of a substitution of H.R. 3030). The House version prevailed in conference, *see id.* at 478-79, so the 1990 Amendments as finally enacted into law do not contain this literal delegation provision. The court is of course correct that the Congress need not use the word "delegate" in order to effect an express delegation, Slip Op. at 15; § 110(o) illustrates the point. That the Congress "specifically rejected language favorable to [EPA's] position," Slip Op. at 12, however, is further evidence that the legislature did not mean to enact a delegation of authority. Indeed, to believe that the Congress meant § 301(d)(2)(B) to serve as a delegation, after it had included the "notwithstanding" proviso in the narrower § 110(o) and removed from § 301(d) a provision that expressly provided a delegation to tribes, would require one to believe the Congress was more interested in testing our interpretive acumen than in clearly expressing its will upon the important issue of tribal authority over nonmembers.

The court claims support for its contrary conclusion in the Congress having "moved from authorizing tribal regulation over the areas 'within the tribal government's jurisdiction' . . . to a bifurcated classification of all areas within 'the exterior boundaries of the reservation' and 'other areas within the tribe's jurisdiction.'" Slip Op. at 12. Putting aside the question-begging interpolation of "all" into the quoted passage, I think the court misapprehends the significance of the phrase "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." As originally

introduced, H.R. 3030 referred only to air resources "within the exterior boundaries of the reservation." 2 1990 Leg. Hist. 3737, 3853. The House Committee on Energy and Commerce without comment added the phrase "or other areas within the tribe's jurisdiction," *id.* at 3021, 3069, and as mentioned, the House version later prevailed in conference. The legislative record is silent about why the Committee added that phrase. The most straightforward interpretation of the addition is that the Committee wanted to ensure that the treatment of tribes as states extended beyond the reservation to non-contiguous areas of tribal authority, such as dependent Indian communities. This seems far more likely than that a House committee, with no discussion, inserted the phrase "or other areas within the tribe's jurisdiction" in order to turn a simple reference to reservations into a delegation of authority over non-Indian lands within reservations.

Finally, I cannot agree with the court that we should find an express congressional delegation of authority in § 301(d)(2)(B) in any part because the contrary reading "would result in a 'checkerboard' pattern of regulation within a reservation's boundaries that would be inconsistent with the purpose and provisions of the [Clean Air] Act." Slip Op. at 11-12. First, it is not at all clear that a "checkerboard" pattern—really a matter of certain fee lands remaining subject to State (or federal) rather than tribal authority, while surrounding areas go tribal—would result: a tribe remains free to demonstrate its inherent authority over any activity on fee lands that "threatens or has some direct effect on . . . the health or welfare of the tribe," *Montana*, 450 U.S. at 566. Therefore, if a tribe does find itself without authority over certain fee lands for want of an express delegation, that is only because no activities on those fee lands threaten or directly affect the health or welfare of the tribe.

Second, tribal authority over less than all lands within the boundaries of a reservation is the logical result of the tribes' "diminished status as sovereigns," *Montana*, 450 U.S. at 565. The *Montana* rule on its face contemplates less than uniform authority within a reservation; unless an exception applies, the tribe cannot regulate a parcel owned by a nonmember even though it retains authority over the surrounding lands owned by the tribe. *See, e.g., Brendale*, 492 U.S. at 428 (White, J., for the Court in part and dissenting in part), 443, 445 (Stevens, J., for the Court in part and concurring in the judgment in part) (each affirming non-uniform zoning authority). While the Congress could have chosen to sweep away such non-uniformity in § 301(d), as it did in § 110(o), the court's evident sense that the Congress should have done so is no basis for reading an express delegation into the statute where the Congress has not written one.*

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* *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962) and *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), cited by the court today, certainly do not counsel reading an express delegation into a statute in order to avoid non-uniform tribal authority within a reservation. In *Seymour*, the Court held that "an impractical pattern of checkerboard jurisdiction was avoided by the plain language of [18 U.S.C.] § 1151," namely, the "notwithstanding" proviso. 368 U.S. at 358. And in *Moe*, the Court determined that because the Congress had "repudiated" but never formally repealed § 6 of the General Allotment Act, 25 U.S. § 349, the court would read § 6 narrowly in order to avoid creating an inconsistency with later-enacted statutes. 425 U.S. at 477-79. Thus, the Court was merely "follow[ing] Congress' lead in this area." *Id.* at 479. So, too, where the Congress has expressly delegated authority, as in § 110(o), we should certainly give its command full rein; but where it has not, we should not undertake to do so for it.

III. Conclusion

In my view, § 301(d)(2)(B) is not an express delegation of authority for Indian tribes to regulate the conduct of nonmembers on fee lands within the boundaries of a reservation. A tribe may be able, of course, to demonstrate its authority over such fee lands under the exception recognized in *Montana*. Without making such a showing, however, I do not believe the tribe may regulate the conduct of nonmembers on fee lands and rights-of-way except as provided by § 110(o). I therefore respectfully dissent from Part II.A. of the opinion for the court.

APPENDIX B

Tribal Authority Rule
63 Fed. Reg. 7254 (February 12, 1998)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9, 35, 49, 50, and 81

[OAR-FRL-5964-2]

RIN 2060-AF79

Indian Tribes: Air Quality Planning and Management

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Clean Air Act (CAA) directs EPA to promulgate regulations specifying those provisions of the Act for which it is appropriate to treat Indian tribes in the same manner as states. For those provisions specified, a tribe may develop and implement one or more of its own air quality programs under the Act. This final rule sets forth the CAA provisions for which it is appropriate to treat Indian tribes in the same manner as states, establishes the requirements that Indian tribes must meet if they choose to seek such treatment, and provides for awards of federal financial assistance to tribes to address air quality problems.

EFFECTIVE DATE: March 16, 1998.

FOR FURTHER INFORMATION CONTACT: David R. LaRoche, Office of Air and Radiation (OAR 6102), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington D.C. 20460 at (202) 260-7652.

SUPPLEMENTARY INFORMATION: Supporting information used in developing the final rule is contained in Docket No. A-93-3087. The docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday, at EPA's Air Docket, Room M-1500, Waterside Mall, 401 M Street SW, Washington, D.C. 20460. A reasonable fee may be charged for copying.

This preamble is organized according to the following outline:

I. Background of the Final Rule

II. Analysis of Major Issues Raised by Commenters

A. Jurisdiction

B. Sovereign Immunity and Citizen Suit

C. Air Program Implementation in Indian Country

D. CAA Sections 110(c)(1) and 502(d)(3) Authority

III. Significant Changes from the Proposed Regulations

IV. Miscellaneous

A. Executive Order (EO) 12866

B. Regulatory Flexibility Act (RFA)

C. Executive Order (EO) 12875 and the Unfunded Mandates Reform Act (UMRA)

D. Paperwork Reduction Act

E. Submission to Congress and the General Accounting Office

I. Background of the Final Rule

Summary of Issues Raised by the Proposal

EPA proposed rules on August 25, 1994 (59 FR 43956) to implement section 301(d) of the Act. The proposal elicited many comments from state and tribal officials, private industry, and the general public. A total of 69 comments were received, of which 44 were from tribes or tribal representatives; 13 from state and local governments or associations; 10 from industry (primarily utilities and mining); and, 1 from Department of Energy (DOE) and 1 from an environmental interest group in Southern California. The tribes and several other commenters generally express support for the proposed rule and the delegation of CAA authority to eligible tribes to manage reservation air resources. Tribes especially urge EPA to expedite the finalization of this rule to enable tribes to begin to implement their air quality management programs and encourage EPA to recognize that the development of tribal air programs will be an evolving process requiring both time and significant assistance from EPA.

Most of the tribal commenters express concern with the inclusion of the citizen suit provisions which, they

believed, effected a waiver of their sovereign immunity; they recommend that this provision be deleted in the final rule. This is a major issue for tribes. State and local government and industry commenters are primarily concerned that the proposed rule would create an unworkable scheme for implementing tribal air quality programs, and many of these commenters question the scope of tribal regulatory jurisdiction.

Responses to many of the comments related to issues of jurisdiction and sovereign immunity are included in sections II.A and II.B in the analysis of comments below. Responses to comments on the issues raised concerning federal implementation in Indian country are addressed in sections II.C and II.D of this document. All other comments are addressed in a document entitled "response to comments" that can be found in the docket for this rule cited above.

II. Analysis of Major Issues Raised by Commenters

A. Jurisdiction

1. Delegation of CAA Authority to Tribes

It is a settled point of law that Congress may, by statute, expressly delegate federal authority to a tribe. *United States v. Mazurie*, 419 U.S. 544, 554 (1975). *See also South Dakota v. Bourland*, 113 S. Ct. 2309, 2319-20 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-28 (1989) (White, J., for four Justice plurality). Such a delegation or grant of authority can provide a federal statutory source of tribal authority over designated areas, whether or not the tribe's inherent authority would extend to all such areas. In the August 25, 1994 proposed tribal authority rule, EPA set forth its interpretation that the CAA is a delegation of federal

authority, to tribes approved by EPA to administer CAA programs in the same manner as states, over all air resources within the exterior boundaries of a reservation for such programs. Today, EPA is finalizing this approach. This grant of authority by Congress enables eligible tribes to address conduct relating to air quality on all lands, including non-Indian-owned fee lands, within the exterior boundaries of a reservation.

EPA's position that the CAA constitutes a statutory grant of jurisdictional authority to tribes is consistent with the language of the Act, which authorizes EPA to treat a tribe in the same manner as a state for the regulation of "air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." CAA section 301(d)(2)(B). EPA believes that this statutory provision, viewed within the overall framework of the CAA, establishes a territorial view of tribal jurisdiction and authorizes a tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land. *See also* CAA sections 110(o), 164(c).

In light of the statutory language and the overall statutory scheme, EPA is exercising the rulemaking authority entrusted to it by Congress to implement the CAA provisions granting approved tribes authority over all air resources within the exterior boundaries of a reservation. *See generally Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). This interpretation of the CAA as generally delegating such authority to approved tribes is also supported by the legislative history, which provides additional evidence of Congressional intention regarding this issue. See S. Rep. No. 228, 101st Cong., 1st Sess. 79 (1989) ("the Act constitutes an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in Indian lands" (citation to *Brendale* omitted)) (hereinafter referred to as "Senate

Report").[1] EPA also believes this territorial approach to air quality regulation best advances rational, sound, air quality management.

(a) Support for the delegation approach. Tribal commenters and several industry commenters support EPA's interpretation that the CAA constitutes a delegation of Congressional authority to eligible tribes to implement CAA programs over their entire reservations. Numerous tribal commenters assert that EPA's territorial delegation approach is consistent with federal Indian law and the intent of Congress as expressed in several provisions of the CAA. Several tribal commenters note that, while tribes have inherent sovereign authority over all air resources within the exterior boundaries of their reservations, EPA should finalize the delegation approach to avoid case-by-case litigation concerning inherent authority and to eliminate the disruptive potential of a "checkerboarded" pattern of tribal and state jurisdiction on reservations. Several tribal commenters assert that the delegation approach is compelled by the language of the CAA and federal Indian law principles. One tribal commenter states that the delegation approach is consistent with the federal government's trust responsibility to federally-recognized Indian tribes.

(b) Statutory Interpretation. Several state commenters assert that the CAA does not constitute an "express congressional delegation" of authority to tribes as

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[1] Further, it is a well-established principle of statutory construction that statutes should be construed liberally in favor of Indians, with ambiguous provisions interpreted in ways that benefit tribes. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S.Ct. 683, 693 (1992). In addition, statutes should be interpreted so as to comport with tribal sovereignty and the federal policy of encouraging tribal independence. *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982).

required by the Supreme Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale*, 492 U.S. 408. Several state and industry commenters dispute EPA's interpretation of CAA section 301(d)(2)(B), which states that EPA may treat a tribe in the same manner as a state if, among other things, "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." One commenter asserts that the "or" in "or other areas within the tribe's jurisdiction" means that treatment of a state is authorized for a tribe as to air resources over which the tribe has jurisdiction, whether or not those areas fall within its reservation boundaries. In other words, tribes would not necessarily have jurisdiction over all sources within reservation boundaries. The commenter states that EPA has improperly read the "or" in section 301(d)(2)(B) as an "and."

EPA believes the plain meaning of section 301(d)(2)(B) is that a tribe can implement a CAA program for air resources if: (1) the air resources are within a reservation; or (2) the air resources are within a non-reservation area over which the tribe can demonstrate jurisdiction. The most plausible reading of the phrase "within * * * the reservation or other areas within the tribe's jurisdiction" is that Congress intended to grant to an eligible tribe jurisdiction over its reservation without requiring the tribe to demonstrate its own jurisdiction, but to require a tribe to demonstrate jurisdiction over any other areas, i.e., non-reservation areas, over which it seeks to implement a CAA program. Under section 301(d)(2)(B), eligible tribes may be treated in the same manner as states for protecting "air resources" within "the reservation" or in "other areas within the tribe's jurisdiction." Both the term "reservation" and the phrase "other areas within the tribe's jurisdiction" modify the phrase "air resources." In addition, it is clear from the

structure of the provision and the CAA and legislative history taken as a whole that the phrase "within the tribe's jurisdiction" modifies the phrase "other areas" and not the term "reservation" or the phrase "air resources." If Congress intended to require tribes to demonstrate jurisdiction over reservations, Congress would have simply stated that EPA may approve a tribal program only for air resources over which the tribe can demonstrate jurisdiction.[2]

One commenter states that EPA's interpretation of CAA section 301(d)(2)(B) has made CAA section 301(d)(4), which allows EPA to administer provisions of the Act directly if treatment of a tribe as identical to a state is found to be "inappropriate or administratively infeasible," extraneous. The commenter asserts that if CAA section 301(d)(2)(B) is a delegation of authority to a tribe, EPA would never have cause to find treatment of a tribe as a state "inappropriate or administratively infeasible." EPA disagrees that its interpretation has made section 301(d)(2)(B) superfluous because, even with the delegation of federal authority to tribes for reservation areas, it is not appropriate or administratively feasible to treat tribes as states for all purposes. In such cases, section 301(d)(4) allows EPA, through rulemaking, to "directly administer such provisions [of the Act] so as to achieve the appropriate purpose" either by tailoring the provisions to tribes or conducting a federal program.

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[2] Contrary to the commenter's assertion, EPA does not interpret the "or" in this section as an "and". If the "or" were an "and", under section 301(d)(2) EPA would be authorized to approve a tribal program "only if" the functions to be exercised by the tribe pertain to air resources that are both within a reservation and within non-reservation areas over which the tribe can demonstrate jurisdiction. This interpretation is nonsensical. Moreover, nothing in the Act or legislative history suggests that Congress intended to limit so severely the universe of tribes eligible for CAA programs.

An industry commenter states that CAA section 110(o), which provides that when a tribal implementation plan (TIP) becomes effective under CAA section 301(d) "the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation * * *," does not support EPA's interpretation of the CAA as a delegation because section 110(o) is only applicable to plans EPA approved pursuant to regulations under section 301(d).

EPA believes that section 110(o) recognizes that approved tribes are authorized to exercise authority over all areas within the exterior boundaries of a reservation for the purposes of TIPs. EPA notes that the commenter omitted the following remaining language in the quoted sentence from CAA section 110(o): "located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." EPA believes that this additional language makes clear that TIPs may apply to all areas within the exterior boundaries of reservations. EPA believes that the phrase "except as expressly provided otherwise in the plan" refers to a situation where a tribe seeks to have its TIP apply only to specific areas within a reservation.

An industry commenter states that the CAA does not depart from other Congressional provisions regarding "treatment as a state" in the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA) and EPA has already determined that these other statutes do not constitute a delegation of authority to tribes. EPA notes that the CAA "treatment as a state" provision is notably different from the SDWA "treatment as a state" provision. *Compare* CAA § 301(d)(2) ("the functions to be exercised by the Indian tribe [must] pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction") *with* SDWA §

1451(b)(1)(B) ("the functions to be exercised by the Indian tribes [must be] within the area of the Tribal Government's jurisdiction"). In addition, although CWA section 518(e) and CAA section 301(d) both contain language regarding tribal programs over "Indian reservations," EPA believes that the overall statutory scheme and legislative history of the CAA represent a clearer expression than that of the CWA that Congress intended to effectuate a delegation to tribes over reservations.[3] EPA notes that, except for the provisions in CWA section 518(e) and SDWA section 1451(b)(1)(B), the Water Acts do not otherwise indicate what areas are subject to tribal regulatory authority. By contrast, several provisions of the CAA expressly recognize that tribes may exercise CAA authority over all areas within the exterior boundaries of the reservation. See CAA sections 110(o) and 164(c).

One industry commenter states that EPA should make clear that the CAA does not supersede other laws that may define or limit the extent of tribal regulatory jurisdiction.[4]

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[3] EPA also notes that a federal district court has stated that CWA section 518(e) may be read as an express delegation of authority to tribes over all reservation water resources. *Montana v. U.S. EPA*, 941 F. Supp. 945, 951, 957 n.10 & n.12 (D. Mont. 1996) citing *Brendale*, 492 U.S. at 428 (White, J.). In the preamble to its 1991 CWA regulation, EPA found the statutory language and legislative history of the CWA too inconclusive for the Agency to rely on the delegation theory, but noted that "the question of whether section 518(e) is an explicit delegation of authority over non-Indians is not resolved." 56 FR 64876, 64880-881 (December 12, 1991).

[4] This commenter also asserts that the *Chevron* doctrine does not support EPA's interpretation that the CAA settles all jurisdictional issues on lands within reservations. While EPA believes that the CAA represents a clear delegation of authority to eligible tribes over reservation resources, EPA notes that, to the extent the statute is ambiguous, EPA's interpretation would be entitled to deference. In addition, the Agency has broad expertise in reconciling federal

The commenter states that, given that the CAA does not supersede all other laws regarding tribal jurisdiction, EPA should follow a case-by-case approach for addressing jurisdiction within reservation boundaries. One state association notes that some states have statutory jurisdiction over non-Indian fee lands located on reservations and EPA does not address how conflicts between the CAA and these statutes will be addressed.

EPA believes that the CAA delegation of authority to eligible tribes over reservations represents a more recent expression of Congressional intent and will generally supersede other federal statutes. See *Adkins v. Arnold*, 235 U.S. 417, 420 (1914) (noting that "later in time" statutes should take precedence). There may be, however, rare instances where special circumstances may preclude EPA from approving a tribal program over a reservation area. For example, in rare cases, there may be another federal statute granting a state exclusive jurisdiction over a reservation area that may not be overridden by the CAA. There may also be cases where a current tribal constitution may limit tribal exercise of authority.[5]

EPA will consider on a case-by-case basis whether special circumstances exist that would prevent a tribe from implementing a CAA program over its reservation. Appropriate governmental entities will have an opportunity to raise these unique issues on a case-by-case basis during EPA's review of a tribal application. Where tribes are aware

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environmental and Indian policies. *Washington Department of Ecology*, 752 F.2d 1465, 1469 (9th Cir. 1985).

[5] Among other things, the commenter questions whether pre-existing treaties or binding agreements may limit the extent of regulatory jurisdiction. EPA believes that the CAA generally would supersede pre-existing treaties or binding agreements that may limit the scope of tribal authority over reservations.

of such issues, they should bring the issues to EPA's attention by including them in the tribe's "descriptive statement of the Indian tribe's authority to regulate air quality" under 40 CFR 49.7(a)(3). If EPA determines that there are special circumstances that would preclude the Agency from approving a tribal program over a reservation area, the Regional Administrator would limit the tribal approval accordingly under 40 CFR 49.9(e) and (g).

(c) Legislative History. Several industry and local government commenters assert that the legislative history does not support EPA's interpretation of the CAA as a delegation. They state that Senate Report No. 101-228, pp. 78-79, 1990 U.S. Code Cong. Admin. News at 3464-65 (Senate Report) evidences Congress' intent that the CAA authorizes tribal programs in the same manner as had been authorized under the CWA and SDWA, both of which EPA has interpreted to authorize tribal programs only in areas over which a tribe can demonstrate inherent jurisdiction. The commenter also states that the Senate Report made clear that treatment as a state is only authorized for areas within a tribe's jurisdiction. In addition, one commenter states that Congress in 1990 knew how similar provisions of the CWA and SDWA had been interpreted and "Congress can normally be presumed to have had knowledge of the interpretation given to the incorporated law. * * *" citing *St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37, 50 (2nd Cir. 1985). One commenter further argues that the Senate Report refers to *Brendale*, which requires a case-by-case approach to tribal inherent jurisdiction.

EPA acknowledges that the summary of the treatment as a state provisions in the Senate Report contains a general statement suggesting that tribes are to demonstrate jurisdiction for all areas for which they seek a program, including reservation areas. However, the summary is followed by a detailed discussion that makes clear that

Congress intended to provide an express delegation of power to Indian tribes for all reservation areas and to require a jurisdictional showing only for non-reservation areas. Senate Report at 79.

In addition, the Senate Report cited *Brendale* for the proposition that Congress may delegate federal authority to tribes. Moreover, although *Brendale* does support a case-by-case approach to evaluating tribal inherent authority over non-members of the tribe, EPA notes that the Senate Report cites the section of the *Brendale* opinion (pages 3006-07) in which Justice White recognizes that Congress may expressly delegate to a tribe authority over non-members. See *Brendale*, 109 S.Ct. 2994, 3006-07 (1989). EPA believes that this statement in the Senate Report further supports EPA's view that the CAA was intended to be a delegation. EPA also notes that in 1989, when the Senate Report was written, EPA had not yet finalized its interpretation that Congress, in the CWA, did not clearly intend a delegation to tribes. See 56 FR 64876, 64880-881 (December 12, 1991); *see also Montana v. EPA*, 941 F. Supp. 945, 951, 957 n.10 & n.12 (noting that the CWA may be read as a delegation of CWA authority to tribes over reservations). Thus, read as a whole, the Senate Report supports EPA's interpretation that the CAA is a delegation.

(d) Limitations on Congressional delegations of authority. Several state and municipal commenters state that *Montana*, *Brendale*, and *Bourland* establish that tribes generally do not have authority to regulate the activities of nonmembers on nonmember-owned fee lands. Several commenters also assert that tribes generally will not have inherent authority over sources of air pollution on non-Indian owned fee lands within a reservation. As discussed in detail in the preamble to the proposed rule (59 FR 43958 *et seq.*), EPA believes that tribes generally will have inherent authority over air pollution sources on fee lands. 59 FR at

43958 n.5; *see also Montana v. EPA*, 941 F.Supp. 945 (D. Mont. 1996)(upholding EPA's determination that the Confederated Salish and Kootenai Tribes possess inherent authority over nonmember activities on fee lands for purposes of establishing water quality standards under the CWA). Nonetheless, because the Agency is interpreting the CAA as an explicit delegation of federal authority to eligible tribes, it is not necessary for EPA to determine whether tribes have inherent authority over all sources of air pollution on their reservations.

Several commenters state that only delegations over lands and activities subject to inherent tribal power are permissible. One commenter states that the proposed rule should be modified to require tribes to establish preexisting authority for on-reservation CAA programs, at least with regard to fee lands held by nonmembers within reservations. Two commenters, one citing the United States Constitution and the other citing *U.S. v. Morgan*, 614 F.2d 166 (8th Cir. 1980), also assert that a tribe cannot have delegated authority over nonmembers on fee lands living in a non-Indian community within a reservation. A state commenter asserts that these two factors, i.e., whether a tribe possesses inherent authority and whether the delegation is over nonmembers living on fee lands within a non-Indian community, were factors considered by the Supreme Court in *Mazurie* in evaluating whether Congress had validly delegated federal authority to tribes to regulate the introduction of alcoholic beverages into Indian country.

EPA believes that Indian tribes have sufficient independent authority to assume a Congressional delegation of authority to implement CAA programs. The Supreme Court in *Mazurie* acknowledged that Indian tribes have sovereignty over "both their members and their territory." 419 U.S. at 557. As discussed above, EPA believes that tribes generally will have inherent authority to regulate

sources of air pollution on nonmember-owned fee lands within reservations as well. However, EPA notes that the Court in *Mazurie* held that it is not necessary for a tribe to have independent authority over all matters that would be subject to the delegated authority; rather "[i]t is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce * * * with the Indian tribes.'" 419 U.S. at 557 (citation omitted).

In addition, while the Court in *Mazurie* noted that Constitutional limits on the authority of Congress to delegate its legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter," the Court did not say that some independent source of authority was an absolute prerequisite for a Congressional delegation. 419 U.S. at 556-57.[6] Even in a case where a particular tribe's inherent authority is markedly limited, the detailed parameters outlined in the CAA and EPA's oversight role over tribal exercise of authority delegated by the CAA are sufficient to ensure that Constitutional limitations on the delegated authority have not been exceeded.

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[6] One industry commenter asserts that delegations of federal authority from Congress must "clearly delineate" policy and standards to be effective or valid, citing *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 105 (1946). According to this commenter, EPA's proposed interpretation does not meet this standard. EPA agrees that the non-delegation doctrine does include a limitation on the devolution of legislative power under terms so vague as to be standardless, but that limitation has become a very low threshold, *see Mistretta v. United States*, 488 U.S. 361 (1989)(Scalia, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (Rehnquist, J., concurring in the judgment), and is easily met by the CAA. The CAA provides detailed direction to tribes on the parameters under which CAA programs are to be implemented.

Furthermore, EPA disagrees with the commenter's assertion that the United States Constitution and federal court precedent prohibit Congress from delegating authority to a tribe over nonmembers on fee land living in a non-Indian community within a reservation. *See City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993), *reh'g en banc denied*, 1994 U.S. App. Lexis 501 (1994), *cert denied*, 512 U.S. 1236 (1994); *see also Rice v. Rehner*, 463 U.S. 713, 715 (1983) (noting that Congress, in 18 U.S.C. 1161, delegated to tribes authority to regulate liquor throughout Indian country, including in non-Indian communities). The discussion in *Morgan and Mazurie* about "non-Indian communities" was centered around the specific language of 18 U.S.C. sections 1154 and 1156 regarding introduction of alcoholic beverages into Indian country, and is not relevant to an interpretation of the CAA. In addition, EPA notes that the Eighth Circuit Court of Appeals, in *City of Timber Lake*, 10 F.3d 554, declined to follow its prior decision in *Morgan*, and concluded that 18 U.S.C. section 1161 delegated authority to tribes to regulate liquor in all of Indian country, including non-Indian communities.

One industry commenter asserts that, if EPA finalizes its position that Congress has delegated federal authority to tribes, EPA should state explicitly in its rule that the Bill of Rights and other federal protections for regulated entities apply to tribal air programs. EPA notes that the Indian Civil Rights Act imposes tribal on governments restrictions similar to those contained in the Bill of Rights and the Fourteenth Amendment, including the prohibitions against the denial of due process and equal protection, and the taking of private property without just compensation. 25 U.S.C. 1302; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). These protections extend to all persons subject to tribal jurisdiction, whether Indians or non-Indians. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 19 (1987). EPA believes that

whether or not the Bill of Rights applies to tribes implementing the CAA on reservations is an issue for the courts to decide when and if the issue arises in a particular case. *See Mazurie*, 419 U.S. at 558 n. 12.

(e) Use of the word "reservation." Several tribal commenters supported EPA's proposal to construe the term "reservation" to include trust land that has been validly set apart for use by a tribe, even though that land has not been formally designated as a "reservation." *See* 59 FR at 43960; 56 FR at 64881; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905, 910 (1991). Some tribal commenters suggested that the definition of "reservation" in proposed § 49.2 be broadened specifically to include "trust land that has been validly set apart for use by a Tribe, even though the land has not been formally designated as a reservation."

A state commenter states that EPA has not provided an analysis of relevant provisions in the CAA to support its proposition that the term "reservation" includes "trust land that has been validly set apart for the use of a Tribe." In addition, this commenter questions EPA's reliance on *Oklahoma Tax Comm'n* because that case deals with trust lands in Oklahoma and may not be universally applicable. Several commenters express concern that the phrase "exterior boundaries of the reservation" could encompass lands held in fee by nonmembers outside of areas formally designated as "reservations." A state commenter suggests that EPA should require a case-by-case demonstration in cases where non-Indian-owned lands exist which may be surrounded by the exterior boundaries of a Pueblo. The commenter asserts that in these circumstances there is no evidence that the non-Indian lands were "validly set apart for the use of the Indians as such, under the superintendence of the Government." The State of Oklahoma objects to EPA's use of the word "reservation" because, by federal law, the term "reservation"

can include former reservations in Oklahoma, which include approximately the entire State. *See* 25 U.S.C. 1425. The State suggests that EPA should limit the term reservation to include only tribal trust land in Oklahoma; lands held in trust for individual Indians, Oklahoma asserts, should not be considered "reservations."

It is the Agency's position that the term "reservation" in CAA section 301(d)(2)(B) should be interpreted in light of Supreme Court case law, including *Oklahoma Tax Comm'n*, in which the Supreme Court held that a "reservation," in addition to the common understanding of the term, also includes trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation. In applying this precedent to construe the term "reservation" in the context of the CWA, the Agency has only recognized two categories of lands that, even though they are not formally designated as "reservations," nonetheless qualify as "reservations": Pueblos and tribal trust lands. EPA will consider lands held in fee by nonmembers within a Pueblo to be part of a "reservation" under 40 CFR 49.6(c) and 49.7(a)(3). EPA will consider on a case-by-case basis whether other types of lands other than Pueblos and tribal trust lands may be considered "reservations" under federal Indian law even though they are not formally designated as such. Appropriate governmental entities will have an opportunity to comment on whether a particular area is a "reservation" during EPA's review of a tribal application. The Agency does not believe that additional, more specific language should be added to the regulatory definition of "reservation," because the Agency's interpretation of the term "reservation" will depend on the particular status of the land in question and on the interpretation of relevant Supreme Court precedent.

A tribal consortium states that the proposed requirement in § 49.7(a)(3) that tribes "must identify with

clarity and precision the exterior boundaries of the reservation * * *" precludes Alaska Native villages from applying for EPA-approved CAA programs. The full language of the proposed requirement in § 49.7(a)(3) is "[f]or applications covering areas within the exterior boundaries of the applicant's Reservation the statement must identify with clarity and precision the exterior boundaries of the reservation * * *." If a tribe is seeking program approval for non-reservation areas, the tribe need not provide a reservation description. As noted below, EPA is finalizing its proposed position, under section 301(d)(2)(B), that an eligible tribe may implement its air quality programs in non-reservation areas provided the tribe can adequately demonstrate authority to regulate air quality in the non-reservation areas in question under general principles of Indian law. Thus, if an Alaska Native village can demonstrate authority to regulate air resources in non-reservation areas, the areas will be considered "other areas within the tribe's jurisdiction" under section 301(d)(2)(B) of the Act.

(f) Policy Rationales. Industry and municipal commenters state that it is improper for EPA to base its interpretation of the CAA regarding tribal jurisdiction on policy arguments seeking to avoid "jurisdictional entanglements" and checkerboarding. A state comments that given the intense controversy surrounding the issue of authority over the activities of nonmembers on fee lands, litigation is likely. The commenter states that litigation would cause long-term jurisdictional uncertainties, which will erode effective implementation of the Act, and that EPA should address and resolve jurisdictional issues in the reservation program planning stage. One industry commenter asserts that EPA's proposal to interpret the CAA as a delegation is inconsistent with EPA policy statements that EPA will authorize tribal programs only where tribes "can demonstrate adequate jurisdiction over pollution sources

throughout the jurisdiction." July 10, 1991 EPA/State/Tribal relations memorandum, signed by Administrator Reilly.

EPA's interpretation of the CAA is based on the language, structure, and intent of the statute. The Agency believes that Congress, in the CAA, chose to adopt a territorial approach to the protection of air resources within reservations—an approach that will have the effect of minimizing jurisdictional entanglements and checkerboarding within reservations. EPA expects that the delegation approach will minimize the number of case-specific jurisdictional disputes that will arise and enhance the effectiveness of CAA implementation. EPA notes that its interpretation of the CAA does not conflict with the Agency's general Indian policy statements regarding tribal jurisdiction. Under the CAA, EPA will not approve a tribe unless it has the authority to implement the program either by virtue of delegated federal authority over reservation areas, or a demonstration of authority under principles of federal Indian law over other areas on a case-by-case basis.

(g) Current and historical application of state laws on parts of reservations. State and industry commenters assert that states have historically regulated non-member CAA-related activities on fee lands within reservation boundaries and the proposal ignores this historical treatment and the transition issues it raises. The commenters suggest that EPA consider changing the proposed regulations to "grandfather" existing facilities subject to state authority, so that states continue to regulate those facilities until the affected parties all agree cooperatively to a transition from state to tribal jurisdiction. One commenter states that both the affected state and EPA would need to approve any necessary state implementation plan (SIP) revisions.

It is EPA's position that, unless a state has explicitly demonstrated its authority and been expressly approved by EPA to implement CAA programs in Indian country, EPA is

the appropriate entity to be implementing CAA programs prior to tribal primacy. See preamble section II.C. and II.D. for a discussion of federal implementation of CAA programs in Indian country. EPA will not and cannot "grandfather" any state authority over Indian country where no explicit demonstration and approval of such authority has been made. EPA, as appropriate, will address any need for SIP revisions on a case-by-case basis.

2. Authority in Non-Reservation Areas Within a Tribe's Jurisdiction

CAA section 301(d)(2)(B) provides that a tribe may be treated in the same manner as a state for functions regarding air resources "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction" (emphasis added). In the August 25, 1994 proposed tribal authority rule, EPA set forth its interpretation that this provision authorizes an eligible tribe to develop and implement tribal air quality programs in non-reservation areas that are determined to be within the tribe's jurisdiction. Today, EPA is finalizing this approach.

(a) Support for EPA's approach. Several tribal commenters support EPA's interpretation that "other areas within the Tribe's jurisdiction" in CAA section 301(d)(2)(B) means that a tribe may implement its air quality programs in non-reservation areas under its jurisdiction, generally including all non-reservation areas of Indian country. One tribal commenter asserts that the "Indian country" standard is the standard consistently used by courts in determining a tribe's jurisdiction.

(b) Request for Clarification. Several commenters request that EPA clarify what is meant by the phrase "other areas within a Tribe's jurisdiction." Some commenters state that this phrase must be clarified to avoid conflicts between

states and tribes in interpreting their own jurisdiction and uncertainty for regulated sources. One commenter urges EPA to develop published criteria by which the Agency will decide whether a tribe may develop and implement a CAA program in areas outside the exterior boundaries of a reservation. Some commenters also request that EPA clarify what is meant by "Indian country."

EPA notes that the phrase "other areas within the tribe's jurisdiction" contained in CAA section 301(d)(2)(B) and 40 CFR 49.6 is meant to include all non-reservation areas over which a tribe can demonstrate authority, generally including all non-reservation areas of Indian country. As noted above, it is EPA's interpretation that Congress has not delegated authority to otherwise eligible tribes to implement CAA programs over non-reservation areas as it has done for reservation areas. Rather, a tribe seeking to implement a CAA program over non-reservation areas may do so only if it has authority over such areas under general principles of federal Indian law.

EPA notes that the definition of "Indian country" contained in 18 U.S.C. section 1151, while it appears in a criminal code, provides the general parameters under federal Indian law of the areas over which a tribe may have jurisdiction, including civil judicial and regulatory jurisdiction. *See DeCoteau v. District County Court*, 420 U.S. 425, 427 n. 2 (1975). EPA acknowledges that there may be controversy over whether a particular non-reservation area is within a tribe's jurisdiction. However, EPA believes that these questions should be addressed on a case-by-case basis in the context of particular tribal applications. EPA has established a process under section 49.9 for appropriate governmental entities to comment on assertions of authority in individual tribal applications. More discussion of the parameters of "Indian country" is provided in the detailed response to comment document.

Some tribal commenters object to EPA's description of the proposed requirement in § 49.7(a)(3)(ii) that, where a tribe seeks to have its program cover areas outside the boundaries of a reservation, the tribe must demonstrate its "inherent authority" over those areas. These commenters assert that the term "inherent authority" must be clarified because it may inappropriately limit the potential sources of tribal authority to regulate non-reservation air resources. EPA agrees that there may be cases where a tribe has authority to regulate a non-reservation area that derives from a federal statute or some other source of federal Indian law that is not based on "inherent authority." Section 49.7(a)(3)(ii) only asks a tribe seeking to implement a CAA program in a non-reservation area to "describe the basis for the tribe's assertion of authority * * *." Under this provision, a tribe may include any basis for its assertion of authority.

Some tribal commenters ask EPA to take the position that the phrase "other areas within the tribe's jurisdiction" means that tribes will have control over sources in close proximity to a reservation. One tribe comments that EPA has a trust responsibility to ensure that tribes have authority to control sources of air pollution outside of reservation boundaries that affect the health and welfare of tribal members living within reservation boundaries. One tribe asks whether non-reservation jurisdictional areas include ceded lands where tribes retain the right to hunt and fish.

As noted above, it is EPA's position that, while Congress delegated CAA authority to eligible tribes for reservation areas, the CAA authorizes a tribe to implement a program in non-reservation areas only if it can demonstrate authority over such areas under federal Indian law. Thus, a tribe may implement a CAA program over sources in non-reservation areas, including ceded territories, if the tribe can demonstrate its authority over such sources under federal Indian law. CAA provisions regarding cross-boundary

impacts are the appropriate mechanisms for addressing cases where sources outside of tribal authority affect tribal health and environments. See, e.g., CAA sections 110(a)(2)(D), 126, and 164(e). The issue of cross-boundary impacts is discussed further in the response to comments document.

(c) Comments challenging EPA's interpretation of the CAA. Some commenters state that CAA section 110(o) limits the jurisdictional reach of a TIP to areas located within the boundaries of a reservation. One commenter asserts that since a tribe can only implement its TIP within a reservation, to allow a tribe to implement other parts of the CAA in non-reservation areas would be unmanageable and unreasonable.

EPA believes that the reference in CAA section 110(o) to "reservation" is simply a description of the type of area over which a TIP may apply. EPA does not believe the provision was intended to limit the scope of TIPs to reservations. CAA section 301(d)(1) authorizes EPA to treat a tribe in the same manner as a state for any provision of the Act (except with regard to appropriations under section 105) as long as the requirements in section 301(d)(2) are met. EPA has decided to include most of the provisions of section 110 in the group of provisions for which treatment of tribes in the same manner as a state is appropriate. Section 301(d)(2) permits EPA to approve eligible tribes to implement CAA programs, including TIPs, over non-reservation areas that are within a tribe's jurisdiction.

An industry commenter asserts that the Senate Report evidences that Congress intended to provide tribes the same opportunity to adopt programs as provided under the CWA and SDWA. This commenter asserts that tribal jurisdiction under those statutes is limited to reservations. EPA notes that the SDWA does not limit tribal programs to reservations. See 42 U.S.C. 300j-11(b)(1)(B) (authorizing a tribal role "within the area of the Tribal Government's jurisdiction."). EPA also notes that there is evidence in the Senate Report

that Congress intended to authorize EPA to approve eligible tribes for CAA programs in non-reservation areas of Indian country that are within a tribe's jurisdiction. The report states that section 301(d) is designed "to improve the environmental quality of the air wit[h]in Indian country in a manner consistent with EPA Indian Policy and 'the overall Federal position in support of Tribal self-government and the government-to-government relations between Federal and Tribal Governments' * * *." Senate Report at 79 (emphasis added) (citing EPA's 1984 Indian Policy); *see also, id.* at 80.

3. Other Jurisdictional Issues

Several local governments comment that the final rule should ensure that tribes with very small reservations do not have authority under an air program to adversely affect economic development in adjacent areas, intrude upon the jurisdiction of local governments, or create checkerboarded regulation. One commenter asserts that the proposal would allow for EPA approval of "islands" of Indian programs and "will create the same problems for states and local governments which EPA believes will be eliminated by granting tribes full regulatory power over all land within reservation borders." In addition, a state commenter states that extending tribal programs to non-reservation areas within the parameters of 18 U.S.C. section 1151 conflicts with EPA's goal under the CAA of increasing cohesive air quality management. Several commenters state that regulation by tribes with very small reservations or other very small areas of Indian country would be administratively impractical.

Several local governments state that a minimum size should be placed on areas to be considered for tribal jurisdiction. An industry commenter suggests that the final rule limit non-reservation tribal programs to those areas under tribal jurisdiction that are contiguous with reservations.

Some local government commenters also state that EPA, instead of a tribe, should consider enforcing programs on small areas of Indian country.

EPA acknowledges that there may be cases where the Agency may approve a tribe's application to implement a CAA program over a relatively small land area. EPA also recognizes that approval of a tribal program over a small area that is surrounded by land covered by a state CAA program could lead to less uniform regulation. However, EPA believes it would be inappropriate to place a blanket limitation on the geographic size of an approvable tribal program. EPA notes that Congress, in the CAA, authorized the Agency to approve tribal CAA programs when a tribe meets the criteria contained in CAA section 301(d)(2)(B) without regard to size of area. In addition, it is long-standing federal Indian policy to support tribal self-government and a government-to-government relationship with federally recognized Indian tribes. See Senate Report at 79; April 29, 1994 Presidential Memorandum, "Government-to-Government Relations with Native American Tribal Governments," 59 FR 22,951 (May 4, 1994). Furthermore, EPA policy favors tribal over federal implementation of environmental programs in areas under tribal jurisdiction. *See* 59 FR at 43962; November 8, 1984 "EPA Policy for the Administration of Environmental Programs on Indian Reservations." EPA also recognizes that under the realities of federal Indian law, there are some small pockets of Indian country under tribal and federal jurisdiction that lie among lands under state jurisdiction. While EPA recognizes that its approval of tribal programs over small areas may result in less uniform regulation in some cases, the Agency believes that the approach to tribal jurisdiction outlined in this Tribal Authority Rule best reconciles federal Indian and environmental policies. See *Washington Department of Ecology*, 752 F.2d at 1469. The Agency's overall approach

minimizes the potential for checkerboarded regulation within Indian reservations (see preamble at II.A.1.(a)), while promoting tribal sovereignty and self-determination.

One tribal commenter states that pollution from air sources outside a tribe's jurisdiction must be addressed. This commenter states that section 126 of the CAA, while designed to address this issue, is awkward and probably difficult to administer. In addition, local government commenters state that the off-site effect of approving tribal programs for Indian lands should be considered. One local commenter states that "mutual protection for air quality goals, health values and customs should be assured for all within any physical air basin to the extent workable."

EPA notes that several provisions of the CAA are designed to address cross-boundary air impacts. EPA is finalizing its proposed approach that the CAA protections against interstate pollutant transport apply with equal force to states and tribes. Thus, EPA is taking the position that the prohibitions and authority contained in sections 110(a)(2)(D) and 126 of the CAA apply to tribes in the same manner as states. As EPA noted in the preamble to its proposed rule, section 110(a)(2)(D), among other things, requires states to include provisions in their SIPs that prohibit any emissions activity within the state from significantly contributing to nonattainment, interfering with maintenance of the national ambient air quality standards (NAAQS), or interfering with measures under the Prevention of Significant Deterioration (PSD) or visibility protection programs in another state or area. In addition, section 126 authorizes any state or tribe to petition EPA to enforce these prohibitions against a state containing an allegedly offending source or group of sources. The issue of cross-boundary impacts is discussed further in the response to comment document.

Several tribal commenters note that, in the preamble to the proposed rule, EPA misstated the dollar limitation

contained in the Indian Civil Rights Act on criminal fines that may be imposed by tribes. EPA agrees that the dollar limitation in the Indian Civil Rights Act on criminal fines is $5,000 as opposed to $500.

B. Sovereign Immunity and Citizen Suit

1. Section 304

In its August 25, 1994 Notice of Proposed Rulemaking (NPR) EPA proposed, under the CAA's section 301(d) rulemaking authority, that the citizen suit provisions contained in section 304 of the Act should apply to tribes in the same manner in which they apply to states. See 59 FR at 43978. In today's final action, EPA is declining to announce a position, in the context of the rulemaking required under section 301(d) of the Act, regarding whether tribes are subject to the citizen suit provisions contained in section 304, and therefore is not finalizing the position stated in the NPR. In order to facilitate tribal adoption and implementation of air quality programs in a manner similar to state-implemented programs, section 301(d) requires EPA to specify through rulemaking those provisions of the Act which the Agency believes are appropriate to apply to tribes. EPA's rulemaking approach has been to deem all CAA provisions appropriate for tribes, except for those provisions specifically listed in the rule regarding which EPA, for various reasons, believes it may be inappropriate for the Agency, solely in the context of its 301(d) authority, to make such a determination. Thus, the direct consequence for today's final action of EPA's decision not to adopt the position presented in the NPR regarding the provisions of section 304 is that section 304 has been added to the list of those CAA provisions which, for section 301(d) purposes, EPA has concluded it is not appropriate to determine that tribes should be treated as states. That list is

contained in section 49.4 of today's rule. EPA is also clarifying the relationship of this final action regarding section 304 to the right that tribes enjoy, as sovereign powers, to be immune from suit. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

The Agency received a number of comments on the section 304 citizen suit issue. One group of industry commenters appears to be in favor of tribes being subject to citizen suits, and is particularly concerned that non-tribal members be provided with similar enforcement opportunities for TIPs as are required for SIPs. The majority of comments received on this issue came from tribal governments, mainly disputing EPA's claim that section 301(d), as a legal matter, provided EPA with the authority to apply the section 304 citizen suit provisions to tribes since doing so would appear to have the effect of administratively waiving tribal sovereign immunity. These commenters argue that only the tribes themselves or Congress may waive tribal sovereign immunity and, further, that Congressional intent to waive tribal sovereign immunity may not be implied but must be express and unequivocal. They do not believe that the CAA, including section 301(d), contains such an express waiver. Several of the commenters also state that because states are subject to section 304 only "to the extent permitted by the Eleventh Amendment to the Constitution," applying it to tribes would likely make the requirement more burdensome than it would be for states. Several tribal commenters also express the view that citizen suit recourse is unnecessary since EPA retains enforcement authority under various other CAA provisions, for example, sections 110(m), 179(a)(4), and 502(i). Finally, concern is expressed that adopting a policy of subjecting tribes to citizen suits could hinder development of tribal air programs because it could add significant resource constraints, financial and otherwise, particularly with respect to potential litigation.

Section 304 of the CAA reflects the general principle underlying all environmental citizen suit provisions, namely that actors who accept responsibility for regulating health-based standards and who voluntarily commit themselves to undertake control programs in furtherance of such goals, ought to be accountable to the citizens those programs are designed to benefit. However, EPA agrees, as several commenters pointed out, that section 304 only applies to states to the extent permitted by the Eleventh Amendment to the Constitution. The Supreme Court has interpreted the provisions of the Eleventh Amendment as generally serving to protect a state from liability to suit where the state does not consent to be sued. EPA believes that, just as states implementing air quality programs are not subject to citizen suits except to the extent permitted by the Eleventh Amendment of the Constitution and the provisions of the Clean Air Act, by analogy, in the context of air program implementation in Indian country, the issue of citizen suit liability would be determined based on established principles of tribal sovereign immunity and the provisions of the Clean Air Act. This is meant to emphasize that no EPA action in this final rule either enhances or limits the immunity from suit traditionally enjoyed by Indian tribes as sovereign powers.

Because the Eleventh Amendment does not apply to tribes (by its terms, the Eleventh Amendment only addresses suits brought "against one of the United States"), and because the provisions of section 304 (and the applicable definitions in section 302) do not expressly refer to tribes, EPA has been concerned that the action it proposed to take may have subjected tribes to citizen suit liability in situations in which citizens could not sue states. Because of this uncertainty, EPA believes it is not appropriate to attempt to resolve this significant issue in the context of the limited scope of the rulemaking required under section 301(d).

EPA also notes that courts have long recognized that citizen plaintiffs may bring actions for prospective injunctive relief against state *officials* under the CAA section 304 citizen suit provisions, as well as under other environmental statutes with similar citizen suit provisions. *See Council of Commuter Organizations v. Metro. Transp.*, 683 F.2d 663, 672 (2nd Cir. 1982). *See also Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1133 n.17 (1996) (acknowledging that lower courts have entertained suits against state officials pursuant to citizen suit provisions in environmental statutes substantially identical to CAA section 304(a)(1)). While this raises the question of whether such actions could be brought against "tribal officials," EPA believes this issue is also outside the scope of this rulemaking.

2. Judicial Review Provisions of Title V

In its proposed rulemaking, EPA proposed to treat tribes in the exact same manner as states for purposes of the provisions of CAA sections 502(b)(6) and 502(b)(7) addressing judicial review under the Title V Operating Permits Program. 59 FR at 43972. For the reasons discussed below, in today's final action EPA is withdrawing its proposal to treat tribes in the exact same manner as states for purposes of these judicial review provisions. As described below, however, tribes that opt to establish a Title V program will still need to meet all requirements of sections 502(b)(6) and 502(b)(7) except those provisions that specify that review of final action under the Title V permitting program be "judicial" and "in State court."

As noted above in the discussion regarding the applicability of CAA section 304 to tribes, commenters express concern over waivers of tribal sovereign immunity to judicial review. Several tribal commenters also note that requiring tribes to waive sovereign immunity in order to run

a Title V program will be a strong disincentive for tribes to assume these programs. Two industry commenters state that nonmembers that are regulated by tribes must have access to courts for judicial review. Several commenters express concern that some tribal governments may lack a distinct judicial system.[7]

EPA recognizes the importance of providing citizens the ability to hold accountable those responsible for regulating air resources. Nonetheless, EPA also acknowledges that applying the judicial review provisions of Title V to tribes through this rule would raise unique issues regarding federal Indian policy and law. EPA is mindful of the vital importance of sovereign immunity to tribes. In addition, EPA is aware that in some instances tribes do not have distinct judicial systems. Finally, EPA has long recognized the importance of encouraging tribal implementation of environmental programs and avoiding the establishment of unnecessary barriers to the development of such programs. *E.g.*, EPA's 1984 Indian Policy; *see also* Senate Report at 8419 (noting that section 301(d) is generally intended to be consistent with EPA's 1984 Indian Policy).

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[7] Two industry commenters stated that tribal courts "lack many procedural, substantive law and constitutional protection[s] for non-members." EPA is aware that tribal governments are not subject to the requirements of the Bill of Rights and the Fourteenth Amendment of the U.S. Constitution, and that review of tribal court decisions in federal court may be limited. However, EPA notes that the Indian Civil Rights Act requires tribes to provide several protections similar to those contained in the Bill of Rights and the Fourteenth Amendment, including due process of law, equal protection of the laws, and the right not to have property taken without just compensation. 25 U.S.C. § 1302; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). These protections extend to all persons subject to tribal jurisdiction, whether Indians or non-Indians. *See Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 19 (1987).

EPA seeks to strike a balance among these various considerations. See *Washington Department of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985).

In order to ensure a meaningful opportunity for public participation in the permitting process, it is EPA's position that some form of citizen recourse be available for applicants and other persons affected by permits issued under tribal Title V programs. One option for review of final actions taken under a tribal Title V program is for tribes to consent to suit through voluntary waiver of their sovereign immunity in tribal court. EPA supports the continued development and strengthening of tribal courts and encourages those tribes that will implement Title V permitting programs to consent to challenges by permit applicants and other affected persons in tribal court. For the reasons discussed above, however, requiring tribes to provide for review in the exact same manner as states pursuant to section 502(b)(6) is not appropriate.

In some cases, well-qualified tribes seeking approval of Title V programs may not have a distinct judiciary, but rather may use non-judicial mechanisms for citizen recourse. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978) ("Non-judicial tribal institutions have * * * been recognized as competent law-applying bodies."). In addition, a requirement that tribes waive their sovereign immunity to judicial review, in some cases, may discourage tribal assumption of Title V programs. Thus, EPA is willing to consider alternative options, developed and proposed by a tribe in the context of a tribal CAA Title V program submittal, that would not require tribes to waive their sovereign immunity to judicial review but, at the same time, would provide for an avenue for appeal of tribal government action or inaction to an independent review body and for injunctive-type relief to which the Tribe would agree to be bound.

EPA has consistently stressed the importance of judicial review under state Title V programs. *E.g., Virginia v. Browner*, 80 F.3d 869, 875 (4th Cir. 1996) ("EPA interprets the statute and regulation to require, at a minimum, that states provide judicial review of permitting decisions to any person who would have standing under Article III of the United States Constitution. Notice of Proposed Disapproval, 59 Fed. Reg. 31183, 31184 (June 17, 1994)"), *cert denied* 117 S.Ct. 764 (1997). However, the statutory scheme regarding tribal clean air programs is quite different from that of states. Section 301(d)(2) of the Act explicitly provides EPA with the discretion to "specify * * * those provisions for which it is appropriate to treat Indian tribes as States." 42 U.S.C. 7601(d)(1). In addition, section 301(d)(4) of the Act states that where EPA "determines that treatment of tribes as identical to states is inappropriate or administratively infeasible, [EPA] may provide, by regulation, other means by which [EPA] will directly administer such provisions so as to achieve the appropriate purpose." 42 U.S.C. 7610(d)(4). As EPA noted in the preamble to the proposed rule, tribes have a "unique legal status and relationship to the Federal government that is significantly different from that of States. [C]ongress did not intend to alter this when it authorized treatment of Tribes 'as States' under the CAA." 59 FR at 43962, n.11.

In addition, there is ample precedent for treating tribes and states differently under federal Indian law. *E.g.*, U.S. Const. amend. XIV; Indian Civil Rights Act, 25 U.S.C. 1301 *et. seq.*; and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In *Santa Clara*, the Supreme Court addressed the availability of federal court review of tribal action under the Indian Civil Rights Act (ICRA), which requires tribal governments to provide several protections similar to those contained in the Bill of Rights and the Fourteenth Amendment. In finding that no additional federal court

remedies beyond habeas corpus were provided by Congress for review of tribal compliance with the ICRA, the Court noted that Congress had struck a balance between the dual statutory objectives of enhancing individual rights without undue interference with tribal sovereignty. *Santa Clara*, 436 U.S. at 65-66. EPA has concluded that in enacting section 301(d) of the Act, Congress provided EPA with the discretion to balance the goals of ensuring meaningful opportunities for public participation under the CAA and avoiding undue interference with tribal sovereignty when determining those provisions for which it is appropriate to treat tribes in the same manner as states. *See Washington Department of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985) ("it is appropriate for us to defer to EPA's expertise and experience in reconciling [Indian policy and environmental policy], gained through administration of similar environmental statutes on Indian lands.").

In addition to the requirement that tribal Title V programs provide some avenue for appeal of tribal government action or inaction and for injunctive-type relief, EPA may use several oversight mechanisms to ensure that tribal Title V programs provide adequate opportunities for citizen recourse. *E.g.*, CAA sections 502(i)(requiring EPA assumption of state or tribal Title V programs that EPA finds are not being adequately implemented or enforced), 505(b) (requiring EPA objection to state or tribal Title V permits that EPA finds do not meet applicable requirements).

Thus, under today's final rulemaking, EPA is not requiring tribes to provide for judicial review in the same manner as states under CAA section 502(b)(6). EPA will develop guidance in the future on acceptable alternatives to judicial review. In reviewing the Title V program submission of any tribe proposing an alternative to judicial review, EPA will apply such guidance to determine, pursuant to its section 301(d) authority, whether the tribe has provided

for adequate citizen recourse consistent with the requirement in CAA section 502(b)(6) that there be review of final permit actions and the guidance and principles discussed above.

EPA emphasizes that tribes seeking to implement the Title V program will still need to meet all the requirements of CAA section 502(b)(6), except the requirements that review of final permit actions be "judicial" and "in state court." Specifically, tribes seeking to implement the Title V program, will need to provide:

[a]dequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for * * * review * * * of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

CAA section 502(b)(6). In addition, all provisions of CAA section 502(b)(7) will apply to tribal programs except the requirements that the review be "judicial" and in "State court."

C. Air Program Implementation in Indian Country

The August 25, 1994, proposed tribal authority rule set forth EPA's view that, based on the general purpose and scope of the CAA, the requirements of which apply nationally, and on the specific language of sections 301(a) and 301(d)(4), Congress intended to give to the Agency broad authority to protect tribal air resources. The proposal went on to state that EPA intended to use its authority under

the CAA "to protect air quality throughout Indian country" by directly implementing the Act's requirements in instances where tribes choose not to develop a program, fail to adopt an adequate program or fail to adequately implement an air program." *Id.* at 43960. Comments on this issue were received from tribes, state and local government representatives, and industry.

The comments generally support the discussion of EPA's authority under the CAA to protect air quality throughout Indian country, but, overall, seek specific clarification with respect to the time frame and scope of federal implementation. In addition, several commenters, although focusing on different aspects of the issue, express a general concern that there be no diminution or interruption in tribal air resource protection while tribal programs are being developed. EPA acknowledges the seriousness of the concerns identified by the commenters and agrees that a clearer presentation of the Agency's intentions is appropriate.

Most tribal commenters support establishing federal air programs under the circumstances outlined in the proposal, but many are concerned with the past lack of enforcement of environmental programs on tribal lands. Almost all commenters express concern with the lack of a definite timetable for federal initiation of air programs to protect tribal air resources and prevent gaps in protection. Tribal Commenters generally support the provision in the proposal to develop an implementation strategy and a plan for reservation air program implementation; however, they request that EPA develop time frames and establish dates for developing the implementation strategy. A state commenter argues that the proposal did not sufficiently allow for state comment or input in the development of the implementation strategy, asserting that both state and tribal involvement will be necessary to avoid regulatory conflicts. A number of government and industry commenters suggest that EPA

elaborate on the process for developing tribal air programs in light of the interrelationship between existing air programs and new tribal programs. Another commenter requests that EPA resolve the process for transition from existing tribal programs to programs as part of this rulemaking. One state comments that the transfer must be accomplished without leaving sources of air pollution and the states in air quality "limbo" pending development of either tribal or EPA programs to regulate sources under the jurisdiction of a tribe. Another state argues that if a tribe has no approved program and EPA has no reason for enforcement, section 116 preserves the state's inherent authority to regulate non-member sources on a reservation. One tribe asks that the process for transferring administration of an EPA-issued permit for a source on tribal lands to the tribe be made more explicit. Many tribal commenters request technical and administrative support in the form of guidance documents, training, sufficient financial resources, and EPA staff assigned to work with tribes on tribal CAA programs who are knowledgeable about tribal law and concerns. These commenters also express concern that limited resources might prevent EPA from providing this critical support.

As indicated above, EPA recognizes the seriousness of the concerns expressed in these comments and has undertaken an initiative to develop a comprehensive strategy for implementing the Clean Air Act in Indian country. The strategy will articulate specific steps the Agency will take to ensure that air quality problems in Indian country are addressed, either by EPA or by the tribes themselves. This strategy [a draft of which is available in the docket referenced above] addresses two major concerns: (1) Gaps in Federal regulatory programs that need to be filled in order for EPA to implement the CAA effectively in Indian country where tribes opt not to implement their own CAA programs; (2) identifying and providing resources, tools, and technical

support that tribes will need to develop their own CAA programs.

EPA believes that the strategy being developed addresses many of the concerns expressed by the commenters. Once tribal programs are approved by EPA, tribes will have authority to regulate all sources within the exterior boundaries of the reservation under such programs. One of the most prevalent concerns is the status of sources (current and future) in Indian country not yet subject to the limits of an implementation plan. Commenters want assurance that EPA would step in to fill this gap and ensure adequate control. The Agency has consistently recognized the primary role for tribes in protecting air resources in Indian country and has expressed its continued commitment to work with tribes to protect these resources in the absence of approved tribal programs. The Agency has issued permits and undertaken the development of Federal Implementation Plans (FIP) to control sources locating in Indian country. For example, the Agency is working with both the Shoshone-Bannock and the Navajo Tribes to address pollution control of major sources on their Reservations. The Agency has also issued PSD preconstruction permits to new sources proposing to locate in Indian country. The Agency has started to explore options for promulgating new measures to ensure that EPA has a full range of programs and Federal regulatory mechanisms to implement the CAA in Indian country.

Since the 1994 proposal, EPA has tried specifically to identify the primary sources of air pollution emissions in Indian country, and evaluate the CAA statutory authorities for EPA to regulate those sources pending submission and approval of a TIP. EPA has determined that the CAA provides the Agency with very broad statutory authority to regulate sources of pollution in Indian country, but there are

instances in which EPA has not yet promulgated regulations to implement its statutory authority.

One example is the absence of complete air permitting programs in Indian country. EPA has promulgated regulations establishing permit requirements for major sources in attainment areas, and issued Prevention of Significant Deterioration permits to new or modifying major sources. See 40 CFR 52.21. However, EPA has not promulgated regulations for a permitting program in Indian country for either minor or major sources of air pollution emissions in nonattainment areas. Therefore, EPA is currently drafting nationally applicable regulations for such minor and major source permitting programs. The permitting programs are expected to apply to construction or modification of all minor sources and to major sources in nonattainment areas. In addition, the planned permitting program would allow existing sources to voluntarily participate in the permitting program and accept enforceable permit limits. EPA regional offices would be the permitting authority for this program. With respect to Title V operating permits, EPA has proposed to include Indian country within the scope of 40 CFR Part 71. Therefore, the Part 71 regulations would apply to all major stationary sources of air pollution located in Indian country.

Many CAA requirements apply in Indian country without any further action by the EPA. For example, the standards and requirements of the Standards of Performance for New Sources, 42 U.S.C. 7411 and 40 CFR Part 60, apply to all sources in Indian country. Similarly, the National Emissions Standards for Hazardous Air Pollutants, 42 U.S.C. 7412 and 40 CFR Part 63 apply in Indian country.

EPA has, however, identified categories of sources of air pollution, such as open burning and fugitive dust, that are not covered by those regulations. For these categorical sources, EPA believes that it has the authority to promulgate

regulations on a national basis that would apply until a TIP has been submitted and approved. EPA has also identified a number of general air quality rules, such as the prohibition against emitting greater than 20 percent opacity, which could be promulgated nationally for application in Indian country pending TIP approval.

EPA is optimistic that any additional regulations can be promulgated and implemented relatively quickly, since, along with the protections they would provide, such regulations can also serve as models which tribes can use in drafting TIPs.

EPA wishes to emphasize that the national rules it intends to promulgate will be analogous to, but not the same in all respects, as the types of rules generally approved into State Implementation Plans. For example, EPA's federal rules are likely to represent an average program, potentially more stringent than some SIP rules and less stringent than others. However, by promulgating such rules, EPA would not be establishing, and should not be interpreted by States as setting, new minimal criteria or standards that would govern its approval of SIP rules. EPA encourages and will work closely with all tribes wishing to replace the future federal regulations with TIPS. EPA intends that its federal regulations will apply only in those situations in which a tribe does not have an approved TIP.

EPA will actively encourage tribes to provide assistance in the development of the proposed regulations referenced above to ensure that tribal considerations are addressed and development of the regulations will be subject to notice and comment rulemaking procedures.

The case-by-case nature of program implementation in Indian country makes it difficult to address concerns about plans and time lines. The Agency's strategy for implementing the CAA in Indian country proposes a multi-pronged approach, one prong of which is federal

implementation described above. The other prongs derive from a "grass-roots" approach in which staff in the EPA regional offices work with individual tribes to assess the air quality problems and develop, in consultation with the tribes, either tribal or federal strategies for addressing the problems.

1. Building Tribal Capacity. An essential component of the Agency's CAA implementation strategy is to assess the extent to which tribes have developed an environmental protection infrastructure and determine how best to build tribal capacity to implement their own CAA programs. The assessment will be done in cooperation with the tribes and may include any or all of the following:

a. Needs Assessment. An initial step for effectively implementing the CAA in Indian country is to identify the air quality concerns and determine how well the tribes are able to address them. EPA will work with the tribes to develop emission inventories and air monitoring studies (where appropriate) to determine the nature of the problem and identify a range of potential control strategies. From this information, EPA and the tribes will jointly develop, as needed, tribal or federal implementation plans (TIPs/FIPs) to address the problem. These TIPs/FIPs may include, for example, controls on minor sources, categorical prohibitory rules, area source controls (e.g., vapor recovery, open burning ordinances).

b. Communication. A critical part of the Agency's strategy to build tribal capacity is outreach and communication. Outreach has already begun as EPA regional staff worked with tribes in their service area to draft the Strategy for Implementing the CAA in Indian Country. Outreach will continue with the promulgation of this rule; staff will meet with Tribes in regional meetings held throughout the country to talk about implementing the rule and answer questions. In follow-up to these initial meetings, EPA will adopt a multi-media approach to communicating

with the Tribes and other stakeholders (conferences, conference calls, newsletters, Internet, etc.) to ensure timely access to information and guidance developed in support of this rule.

c. Training. The third component for building tribal capacity is training, providing in various forms and through various media the skills and knowledge needed to implement an air quality protection program in Indian country. EPA already supports a training program at Northern Arizona University (NAU) that offers basic introductory workshops on air quality program management and administration and a more in-depth course in air pollution control technology. This program, offered at no cost to tribes, helps tribal environmental professionals develop competence in air quality management. The program also prepares these professionals for enrollment in more advanced courses in EPA's Air Pollution Training Institute (APTI). In addition to these formal training opportunities, EPA offers internships to college students interested in pursuing an environmental career and supports an outreach program in high schools in Indian country to encourage these students' interest in environmental protection careers. EPA plans to encourage other options for promoting tribal professional development, including peer-to-peer support, temporary assignments with other government (state, tribal, or federal) environmental programs, and cooperative agreements to provide technical assistance.

As these individual tribal assessments are completed, the information will be compiled in order to determine to what extent commonalities exist among the air quality problems that might be amenable to common solutions (e.g., Title V, minor sources, etc.). The Agency will work in concert to develop other common solutions, as needed. At the same time, EPA is developing guidance documents,

templates, and model analyses to assist tribes in developing Tribal Air Programs.

Finally, EPA recognizes that air quality problems in Indian country do not exist in isolation and that often they are part of a broader spectrum of environmental problems, the solutions for which may be best developed through an integrated approach to environmental protection. EPA's Office of Air & Radiation will continue to work with other media offices to develop overall environmental assessments (through the Tribal/EPA Environmental Agreement process) for Indian country and develop integrated approaches where appropriate. One approach, for example, might be to focus on ways to simultaneously protect air quality, water quality, and other public health and environmental values through control strategies that reduce atmospheric deposition of air pollutants in Indian country.

D. CAA Sections 110(c)(1) and 502(d)(3) Authority

In the proposed tribal rule, EPA stated that it was not proposing to treat tribes in the same manner as states under its section 301(d) authority with respect to the specific provision in section 110(c)(1) that directs EPA to promulgate, "within 2 years," a Federal Implementation Plan (FIP) after EPA finds that a state has failed to submit a required plan, or has submitted an incomplete plan, or within 2 years after EPA has disapproved all or a portion of a plan. 59 FR at 43965. The proposed exception applied only for that provision of section 110(c)(1) that sets a specified date by which EPA must issue a FIP. The proposal went on to state that "EPA would continue to be subject to the basic requirement to issue a FIP for affected [tribal] areas within some reasonable time." In today's action, EPA is finalizing the general approach discussed in the proposal, but has altered the method for implementing that approach.

Therefore, although the result that was intended by the proposal remains unchanged, after further review, EPA is modifying the regulatory procedure by which it achieves that result, and is also clarifying the statutory basis it is relying upon for doing so.

The proposed rule set forth EPA's view that one of the principal goals of the rulemaking required under section 301(d) is to allow tribes the flexibility to develop and administer their own CAA programs to as full an extent as possible, while at the same time ensuring that the health and safety of the public is protected. However, since, among other things, tribal authority for establishing CAA programs was expressly addressed for the first time in the 1990 CAA Amendments, in comparison to states, tribes in general are in the early stages of developing air planning and implementation expertise. Accordingly, EPA determined that it would be infeasible and inappropriate to subject tribes to the mandatory submittal deadlines imposed by the Act on states, and to the related federal oversight mechanisms in the Act which are triggered when EPA makes a finding that states have failed to meet required deadlines or acts to disapprove a plan submittal. As the proposal noted, section 301(d)(2) provides for EPA to promulgate regulations specifying those provisions for which it is appropriate to treat tribes as states, but does not compel tribes to develop and seek approval of air programs. In other words, there is no date certain submittal requirement imposed by the Act for tribes as there is for states. Thus, since the FIP obligation under section 110(c)(1) is keyed to plan submission failures by states that are contemplated with respect to "a required submission," and to plan disapprovals that have not been cured within a specified time frame, the discussion in the proposal regarding section 110(c)(1) was consistent with the approach summarized above. However, given that the statutory basis underlying section 110(c)(1) is either

expressly inapplicable to tribal plans or is linked to submittal deadlines that the Agency is today determining are inappropriate or infeasible to apply to tribal plan submissions, that section as a whole—not merely the provision setting a specific date by which EPA must issue a FIP—should have been included on the list of proposed CAA provisions for which EPA would not treat tribes in the same manner as states.

Consequently, in this final action, EPA has added section 110(c)(1) in its entirety to the list of CAA provisions in the rule portion of this action (§ 49.4) for which EPA is not treating tribes in the same manner as states. However, by including the specific FIP obligation under section 110(c)(1) on the list in section 49.4 of this final rule, EPA is not relieved of its general obligation under the CAA to ensure the protection of air quality throughout the nation, including throughout Indian country. In the absence of an express statutory requirement, EPA may act to protect air quality pursuant to its "gap-filling" authority under the Act as a whole. See, *e.g.*, CAA section 301(a). Moreover, section 301(d)(4) provides EPA with discretionary authority, in cases where it has determined that treatment of tribes as identical to states is "inappropriate or administratively infeasible," to provide for direct administration through other regulatory means. EPA is exercising this discretionary authority and has created a new section (§ 49.11) to this final rule which provides that the Agency will promulgate a FIP to protect tribal air quality within a reasonable time if tribal efforts do not result in adoption and approval of tribal plans or programs. Thus, EPA will continue to be subject to the basic requirement to issue a FIP for affected tribal areas within some reasonable time.

The proposal notice made clear that even while the Agency was proposing not to treat tribes as states for purposes of the specified date in section 110(c)(1), it was

always EPA's intention to retain the requirement to issue a FIP, as necessary and appropriate, for affected tribal areas. The bases and rationale for that determination are thoroughly set forth in 59 FR 43956 (especially at pages 43964 through 43966) and remain the same. The only change between the proposal and this final notice regards the methodology used to achieve the intended result, i.e., using the Agency's section 301(d)(4) discretionary authority in conjunction with its general "gap-filling" CAA authority.

Similarly, EPA is taking final action on its proposal not to treat tribes in a manner similar to states for the provision of section 502(d)(3) which requires issuance by EPA, within two years of the statutory submittal deadline, of a federal operating permit program if EPA has not approved a state program. The Agency has proposed, pursuant to its section 301(d)(4) authority, to include in its final rule addressing federal implementation of operating permit programs in Indian country a commitment to implement such programs by a date certain in instances where a tribe chooses not to implement a program or does not receive EPA approval of a submitted program. 62 FR 13748. In light of this commitment, EPA does not believe it is necessary to retain the text in § 49.4(j) acknowledging its federal authority.

III. Significant Changes to the Proposed Regulations

A. Part 35—State and Local Assistance

Section 35.205 Maximum Federal Share and Section 35.220 Eligible Indian Tribe. In its proposed rule, EPA sought comment on the appropriate level of tribal cost share for a section 105 grant, from a minimum of five percent to a maximum of 40 percent. The proposal also asked for comments on the establishment of a phase-in period for tribes

to meet whatever match is ultimately required for section 105 grants. Tribes universally comment that the level of matching funds should be kept to a minimum, i.e., five percent, if not waived altogether, especially during the early stages of developing an air quality program. One tribe asserts that Title V cannot be viewed as the solution to funding tribal air programs; other financial resources must also be made available. In addition, EPA notes that only a small number of tribes have applied for section 105 grants despite being eligible to receive such grants as air pollution control agencies under section 302(b)(5) and section 301(d)(5). EPA attributes much of the tribes' reluctance to apply for these grants to the match requirement of forty percent that has been applicable to all section 105 grants.

EPA agrees with the commenters that tribal resources generally are not adequate to warrant the level of match required of states and that equivalent resources are unlikely to become available in the foreseeable future. A high match requirement would likely discourage interested tribes from developing and implementing air programs. It is not appropriate to compare the resources available for the development of state programs to that of tribes because tribes often lack the resources or tax infrastructure available to states for meeting cost share requirements. Furthermore, a low match requirement, with a hardship waiver, is consistent with federal Indian policy which encourages the removal of obstacles to self-government and impediments to tribes implementing their own programs.

Accordingly, EPA has determined that it is inappropriate to treat tribes identically to states for the purpose of the match requirement of section 105 grants. Therefore, pursuant to its authority under section 301(d)(4), EPA will provide a maximum federal contribution of 95 percent for financial assistance under section 105 to those tribes eligible for treatment in the same manner as states for

two years from the initial grant award. After the initial two-year period of 5 percent match, EPA will increase each tribe's minimum cost share to 10 percent, as long as EPA determines that the tribe meets certain objective and readily-available economic indicators that would provide an objective assessment of the tribe's ability to increase its share. Within eighteen months of the promulgation of this rule, the Agency will, with public input, develop guidance setting forth the precise procedures for evaluating tribal economic circumstances and will identify those economic indicators (for example, tribal per capita income, tribal unemployment rates, etc.) that will be used to support its determinations.

The tribal match will not be waived unless the tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used. The Agency does not foresee any circumstances that would justify eliminating this waiver provision for those eligible tribes that are able to demonstrate that meeting the match requirement would result in undue financial hardship. This waiver provision is not available to tribes that establish eligibility for a section 105 grant pursuant to § 35.220(b).

The EPA will examine the experience of this program and other relevant information to determine appropriate long-term cost share rates within five years of the date of publication of this rule.

Finally, the definition of Indian Tribe in § 35.105 has been changed to make it consistent with the definition found in the CAA at section 302(r) and the definition in § 49.2.

B. Title V Operating Permits Program: Operational Flexibility

The Agency received comments that objected to the proposed rule's position that tribal part 70 programs would not be required to include the same operational flexibility provisions required of state part 70 programs. The proposal preamble suggested that the three operational flexibility provisions at 40 CFR 70.4(b)(12) would be optional for tribes as would 40 CFR 70.6(a)(8), 40 CFR 70.6(a)(10), and 40 CFR 70.6(a)(9). A brief description of each of these provisions follows.

The three operational flexibility provisions in § 70.4(b)(12) require permitting authorities to: (1) allow certain changes within a facility without requiring a permit revision; (2) allow for trading increases and decreases in emissions in the facility where the applicable implementation plan provides for such trading; and (3) allow trading of emissions increases and decreases in the facility for the purposes of complying with a federally-enforceable emissions cap that is established in the permit. These provisions implement section 502(b)(10) of the Act. EPA has proposed to modify these provisions, by deleting the first provision and making some technical clarifications to the third provision. See 60 FR 45529 (August 31, 1995).

Section 70.6(a)(8) requires as a standard condition that permits contain a provision stating that no permit revision shall be required under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit.

Section 70.6(a)(10) requires a standard condition (upon request of the applicant) that allows for emissions trading at a source if the applicable requirement provides for trading without a case-by-case approval of each emission trade.

Section 70.6(a)(9) requires as a standard condition (upon request of the applicant and approval by the permitting authority) terms that describe reasonably anticipated operating scenarios.

Initially, EPA believed that the technical expertise required to implement operational flexibility provisions would make it too difficult for tribal programs to obtain EPA approval. Accordingly, the Agency proposed that, for purposes of these provisions, tribes would not be treated in the same manner as states. However, EPA now believes that a better approach would be to treat tribes in the same manner as states for purposes of these provisions, while providing sufficient technical assistance, if needed, to enable tribes to issue permits that meet these operational flexibility requirements. Such an approach will assure that sources will be provided maximum flexibility regardless of whether the permitting agency is a tribal or state agency. In addition, it will afford sources that are subject to tribal part 70 programs the benefit of streamlined provisions that have been proposed for part 70.

C. Section 49.4 Clean Air Act Provisions for Which Tribes Will Not Be Treated in the Same Manner as States

Based on the comments received regarding tribal sovereign immunity and citizen suits (see discussion at II.B), EPA is withdrawing its proposal to treat tribes as states for purposes of section 304 and the judicial review provisions of sections 502(b)(6) and 502(b)(7) of the Act and has revised § 49.4 accordingly.

D. Section 49.8 Provisions for Tribal Criminal Enforcement Authority

EPA is modifying the language under this provision to clarify the federal role in criminal enforcement of tribal programs. Where tribes are precluded by law from asserting criminal enforcement authority, the federal government will exercise criminal enforcement responsibility. To facilitate this process, the Criminal Investigation Division office located at the appropriate EPA regional office and the tribe will establish a procedure by which any duly authorized agency of the tribe (tribal environmental program, tribal police force, tribal rangers, tribal fish and wildlife agents, tribal natural resources office, etc.) shall provide timely and appropriate investigative leads to any agency of the federal government (EPA, U.S. Attorney, BIA, FBI, etc.) which has authority to enforce the criminal provisions of federal environmental statutes. This procedure will be incorporated into the Memorandum of Agreement between the tribe and EPA. Nothing in the agreement shall be construed to limit the exercise of criminal enforcement authority by the tribe under any circumstances where the tribe may possess such authority.

E. Section 49.9 EPA Review of Tribal Clean Air Act Applications

New Process for Determining Eligibility of Tribes for CAA Programs

Many state, local government and industry commenters suggest that the proposed 15-day review period provided by EPA to identify potential disputes regarding a tribal applicant's assertion of reservation boundaries and jurisdiction over non-reservation areas should be extended. Suggested changes to the proposed 15-day review period range from 30 to 120 days. Commenters cite the potential complexity of jurisdictional issues and the amount of time

required to respond adequately, especially for non-reservation areas. These commenters also express concern that notice and an opportunity for comment regarding reservation boundaries and tribal jurisdiction over non-reservation areas is being limited to "appropriate governmental entities." Industry commenters suggest that notice and opportunity for comment also be provided to the regulated community, as well as other interested parties (e.g., landowners whose property could potentially fall under tribal jurisdiction). In addition, one industry commenter states that such determinations should be viewed as rulemakings under the Administrative Procedures Act (APA) and, thus, subject to public notice and comment.

Consistent with the TAS process which EPA has historically implemented under the Clean Water and Safe Drinking Water Acts, the preamble to EPA's proposed rule on tribal CAA programs stated that the CAA TAS process "will provide States with an opportunity to notify EPA of boundary disputes and enable EPA to obtain relevant information as needed[.]" 59 FR at 43963. The proposal also indicated that a principal concern in developing the eligibility process was to streamline the process to eliminate needless delay. *Id.* In proposing to limit the notice and comment provision to "appropriate governmental entities" and the period within which to respond to 15 days with the possibility of a one-time extension of another 15 days, EPA was generally affirming prior "treatment as state" (TAS) practice. EPA notes that neither the Water statutes nor the CAA mandates a specific process regarding TAS determinations, including jurisdiction. Under CAA section 301(d)(2)(B), EPA must evaluate whether a tribe has demonstrated that the air resource activities it seeks to regulate are either within a reservation area, or within a non-reservation area over which the tribe has jurisdiction. In doing so, the Agency has provided for notice and a limited

opportunity for input respecting the existence of competing claims over tribes' reservation boundary assertions and assertions of jurisdiction over non-reservation areas to "appropriate governmental entities," which the Agency has defined as states, tribes and other federal entities located contiguous to the tribe applying for eligibility. See generally, 56 FR 64876, 64884 (Dec. 12, 1991). This practice recognizes, in part, that to the extent genuine reservation boundary or non-reservation jurisdictional disputes exist, the assertion of such are an inherently government-to-government process. Nonetheless, EPA seeks to make its notification sufficiently prominent to inform local governmental entities, industry and the general public, and will consider relevant factual information from these sources as well, provided (for the reason given above) they are submitted through the identified "appropriate governmental entities." In making determinations regarding eligibility in the context of the Water Acts, EPA has explained that the part of the process that involves notifying "appropriate governmental entities" and inviting them to review the tribal applicant's jurisdictional assertion is designed to be a fact-finding procedure to assist EPA in making these statutorily-prescribed determinations regarding the tribes' jurisdiction; it is not in any way to be understood as creating or approving a state or non-tribal oversight role for a statutory decision entrusted to EPA. For these reasons, EPA also disagrees with the industry commenter about the status of these decisions under the APA. Given that there is no particular process specified under EPA governing statutes for TAS eligibility determinations, they are in the nature of informal adjudications for APA purposes. As such, EPA does not believe there is a legal requirement for any additional process than what the Agency already provides. By contrast, EPA decisions regarding tribal authority to implement CAA programs generally are rulemaking actions involving public

notice and comment in the **Federal Register**. The approach in the proposed CAA rule was intended to follow the above process, including its imposed limitations (such as a 15-day review period), to ensure that overall eligibility decisions should not be delayed unduly.

In today's rulemaking, EPA recognizes that the potential complexities of reservation boundary and non-reservation jurisdictional issues may require additional review time and is finalizing an initial notice and comment period of 30 days with the option for a one-time extension of 30 days for disputes over non-reservation areas, should the issues identified by the commenters warrant such extension. EPA agrees that in some cases issues regarding tribal jurisdiction over non-reservation areas may be complex and may require more extensive analysis. However, EPA believes that many jurisdictional claims will be non-controversial and will not elicit adverse comments. In these instances, a comment period in excess of 30 days is not warranted. If, however, the tribal claims involve non-reservation areas and require more extensive analysis, an extension to the comment period may be warranted. In all cases, comments from appropriate governmental entities must be offered in a timely manner, and must be limited to the tribe's jurisdictional assertion.

State and industry commenters question the appropriateness of the language in § 49.9 of the regulatory portion of the proposal which states that eligibility decisions regarding a tribe's jurisdiction will be made by EPA Regional Administrators, as it appears to imply that jurisdictional disputes will always be resolvable at the Agency level. EPA continues to believe that the Regional Administrators are the appropriate decision makers for tribal eligibility purposes, including jurisdictional assertions. However, the Agency does agree that the language, as written, may have been confusing. Consequently, EPA has

modified the first sentence of § 49.9(e). As explained previously, EPA has been making eligibility decisions pursuant to the TAS process under other environmental statutes for some time now. The TAS process set forth in this rule, including the process for making tribal jurisdictional determinations, is consistent with the approach followed by EPA in related regulatory contexts. EPA notes again that it believes that many submissions regarding jurisdiction by tribes requesting eligibility determinations will be non-controversial.

This final rule allows tribes to submit simultaneously to EPA a request for an eligibility determination and a request for approval of a CAA program. In such circumstances, EPA will likely announce its decision with respect to eligibility and program approval in the same **Federal Register** notice, for purposes of administrative convenience. However, EPA does not intend this simultaneous decision process of itself to be interpreted as altering the Agency's view (described above) regarding APA applicability with respect to notice and review opportunities provided to appropriate governmental entities with respect to tribal reservation boundary and non-reservation jurisdictional assertions.

F. Section 49.11 Actions Under Section 301(d)(4) Authority

This section addresses the regulatory provisions being added to this rule pursuant to CAA section 301(d)(4). See discussion at Part II.D above.

IV. Miscellaneous

A. Executive Order (EO) 12866

Section 3(f) of EO 12866 defines "significant regulatory action" to mean any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

This rule was determined to be a significant regulatory action. A draft of this rule was reviewed by the Office of Management and Budget (OMB) prior to publication because of anticipated public interest in this action including potential interest by Indian tribes and state/local governments.

EPA has placed the following information related to OMB's review of this proposed rule in the public docket referenced at the beginning of this notice:

(1) Materials provided to OMB in conjunction with OMB's review of this rule; and

(2) Materials that identify substantive changes made between the submittal of a draft rule to OMB and this notice, and that identify those changes that were made at the suggestion or recommendation of OMB.

B. Regulatory Flexibility Act (RFA)

Under the RFA, 5 U.S.C. 601-612, EPA must prepare, for rules subject to notice-and-comment rulemaking, initial and final Regulatory Flexibility Analyses describing the impact on small entities. The RFA defines small entities as follows:

—Small businesses. Any business which is independently owned and operated and is not dominant in its field as defined by Small Business Administration regulations under section 3 of the Small Business Act.

—Small governmental jurisdictions. Governments of cities, counties, towns, townships, villages, school districts or special districts, with a population of less than fifty thousand.

—Small organizations. Any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

However, the requirement of preparing such analyses is inapplicable if the Administrator certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

The rule will not have a significant economic impact on a substantial number of small entities. Many Indian tribes may meet the definition of small governmental jurisdiction provided above. However, the rule does not place any mandates on Indian tribes. Rather, it authorizes Indian tribes at their own initiative to demonstrate their eligibility to be treated in the same manner as states under the Clean Air Act, to submit CAA programs for specified provisions and to request federal financial assistance as described elsewhere in this preamble. Further, the rule calls for the minimum information necessary to effectively evaluate tribal applications for eligibility, CAA program approval and federal financial assistance. Thus, EPA has attempted to minimize the burden for any tribe that chooses to participate in the programs provided in this rule.

The regulation will not have a significant impact on a substantial number of small businesses. Any additional economic impact on the public resulting from implementation of this regulation is expected to be negligible, since tribal regulation of these activities is limited to areas within reservations and non-reservation areas within tribal jurisdiction and, in any event, EPA has regulated or may regulate these activities in the absence of tribal CAA programs.

The regulation will not have a significant impact on a substantial number of small organizations for the same reasons that the regulation will not have a significant impact on a substantial number of small businesses.

Accordingly, I certify that this regulation will not have a significant economic impact on a number of small entities.

C. Executive Order (EO) 12875 and the Unfunded Mandates Reform Act

EO 12875 is intended to reduce the imposition of unfunded mandates upon state, local and tribal governments. To that end, it calls for federal agencies to refrain, to the extent feasible and permitted by law, from promulgating any regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government, unless funds for complying with the mandate are provided by the federal government or the Agency first consults with affected state, local and tribal governments.

The issuance of this rule is required by statute. Section 301(d) of the CAA directs the Administrator to promulgate regulations specifying those provisions of the Act for which it is appropriate to treat Indian tribes as states. Moreover, this rule will not place mandates on Indian tribes. Rather, as discussed in section IV.B above, this rule

authorizes or enables tribes to demonstrate their eligibility to be treated in the same manner as states under the Clean Air Act and to submit CAA programs for the provisions specified by the Administrator. Further, the rule also explains how tribes seeking to develop and submit CAA programs to EPA for approval may qualify for federal financial assistance.

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104-4, signed into law on March 22, 1995, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under sections 202 and 205 of the UMRA, EPA generally must prepare a written statement of economic and regulatory alternatives analyses for proposed or final rules with federal mandates, as defined by the UMRA, that may result in expenditures to state, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. The section 202 and 205 requirements do not apply to today's action because it is not a "Federal Mandate" and because it does not impose annual costs of $100 million or more.

Today's rule contains no federal mandates for state, local or tribal governments or the private sector for two reasons. First, today's action does not impose any enforceable duties on any state, local or tribal governments or the private sector. Second, the Act also generally excludes from the definition of a "federal mandate" duties that arise from participation in a voluntary federal program. As discussed above and in Section IV.B., the rule that is being promulgated today merely authorizes eligible tribes to seek, at their own election, approval from EPA to implement CAA programs for the provisions specified by the Administrator. Moreover, EPA has regulated or may regulate these activities in the absence of Tribal CAA programs.

Even if today's rule did contain a federal mandate, this rule will not result in annual expenditures of $100

million or more for state, local, and tribal governments, in the aggregate, or the private sector. This rule only addresses CAA authorizations that pertain to tribal governments, not to state or local governments, and calls for tribal governments to submit the minimum information necessary to effectively evaluate applications for eligibility and CAA program approval. The rule also explains how tribes seeking to develop and submit CAA programs for approval may qualify for federal financial assistance and, thus, minimize any economic burden. Finally, any economic impact on the public resulting from implementation of this regulation is expected to be negligible, since tribal regulation of CAA activities is limited to reservation areas and non-reservation areas over which a tribe can demonstrate jurisdiction.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, section 203 of the UMRA requires EPA to develop a plan for informing and advising any small government. EPA consulted with tribal governments periodically throughout the development of the proposed rule, and met directly with tribal representatives at three major outreach meetings. Since issuance of the proposed rule, EPA also received extensive comments from, and has been in communication with, tribal governments regarding all aspects of this rule. The Agency is also committed to providing ongoing assistance to tribal governments seeking to develop and submit CAA programs for approval.

D. Paperwork Reduction Act

OMB has approved the information collection requirements pertaining to grants applications contained in this rule under the provisions of the Paperwork Reduction

Act, 44 U.S.C. 3501, *et seq.* and has assigned OMB control number 2030-0020.

This collection of information pertaining to the grants application process has an estimated reporting burden averaging 29 hours per response and an estimated annual record keeping burden averaging 3 hours per respondent. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The Office of Management and Budget has also approved the information collection requirements pertaining to an Indian tribe's application for eligibility to be treated in the same manner as a state or "treatment as state" as provided by this rule under the *Paperwork Reduction Act*, 44 U.S.C. 3501, *et seq.* and has assigned OMB control number 2060-0306. This rule provides that each tribe voluntarily choosing to apply for eligibility is to meet eligibility by demonstrating it: (1) Is a federally recognized tribe; (2) has a governing body carrying out substantial governmental duties and powers; and (3) is reasonably expected to be capable of carrying out the program for which it is seeking approval in a manner consistent with the CAA and applicable regulations. If a tribe is asserting jurisdiction over non-reservation areas, it must demonstrate that the legal and factual basis for its jurisdiction is consistent with applicable principles of federal Indian law.

This collection of information for treatment in the same manner as states to carry out the Clean Air Act has an estimated reporting burden of 20 annual responses, averaging 40 hours per response and an estimated annual record keeping burden averaging 800 hours. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15. EPA is amending the table in 40 CFR Part 9 of currently approved ICR control numbers issued by OMB for various regulations to list the information requirements contained in this final rule.

E. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 35

Environmental protection, Air pollution control, Coastal zone, Grant programs—environmental protection, Grant programs—Indians, Hazardous waste, Indians, Intergovernmental relations, Pesticides and pests, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

40 CFR Part 49

Environmental protection, Air pollution control, Administrative practice and procedure, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 50

Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: February 3, 1998.
Carol M. Browner,
Administrator.

For the reasons set out in the Preamble, title 40, chapter I of the Code of Federal Regulations is amended as set forth below:

PART 9 – OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 et seq., 136-136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601-2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 et seq., 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971-1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g-1, 300g-2, 300g-3, 300g-4, 300g-5, 300g-6, 300j-1, 300j-2, 300j-3, 300j-4, 300j-9, 1857 et seq., 6901-6992k, 7401-7671q, 7542, 9601-9657, 11023, 11048.

2. In § 9.1 the table is amended by adding a heading and entries in numerical order to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB Control No.

* * * * *

Indian Tribes:

Air Quality Planning and Management

49.6.....2060-3060
49.7.....2060-3060

* * * * *

PART 35—STATE AND LOCAL ASSISTANCE

3. The authority cite for part 35, subpart a, continues to read as follows:

Authority: Secs. 105 and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7405 and 7601(a)); Secs. 106, 205(g), 205(j), 208, 319, 501(a), and 518 of the Clean Water Act, as amended (33 U.S.C. 1256, 1285(g), 1285(j), 1288, 1361(a) and 1377); secs. 1443, 1450, and 1451 of the Safe Drinking Water Act (42 U.S.C. 300j-2, 300j-9 and 300j-11); secs. 2002(a) and 3011 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6912(a), 6931, 6947, and 6949); and secs. 4, 23, and 25(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136(b), 136(u) and 136w(a)).

4. Section 35.105 is amended by revising the definitions for "Eligible Indian Tribe," "Federal Indian Reservation," and the first definition for "Indian Tribe," and by removing the second definition for "Indian Tribe" to read as follows:

§ 35.105 Definitions.

Eligible Indian Tribe means:

(1) For purposes of the Clean Water Act, any federally recognized Indian Tribe that meets the requirements set forth at 40 CFR 130.6(d); and

(2) For purposes of the Clean Air Act, any federally recognized Indian Tribe that meets the requirements set forth at Sec. 35.220.

Federal Indian Reservation means for purposes of the Clean Water Act or the Clean Air Act, all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

Indian Tribe means:

(1) Within the context of the Public Water System Supervision and Underground Water Source Protection grants, any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over a defined area.

(2) For purposes of the Clean Water Act, any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation.

(3) For purposes of the Clean Air Act, any Indian Tribe, band, nation, or other organized group or community, including any Alaskan Native Village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

* * * * *

5. Section 35.205 is amended by adding new paragraphs (c), (d), and (e) to read as follows:

§ 35.205 Maximum Federal share.

* * * * *

(c) For Indian Tribes establishing eligibility pursuant to § 35.220(a), the Regional Administrator may provide financial assistance in an amount up to 95 percent of the approved costs of planning, developing, establishing, or improving an air pollution control program, and up to 95 percent of the approved costs of maintaining that program. After two years from the date of each Tribe's initial grant award, the Regional Administrator will reduce the maximum federal share to 90 percent, as long as the Regional Administrator determines that the Tribe meets certain economic indicators that would provide an objective assessment of the Tribe's ability to increase its share. The EPA will examine the experience of this program and other relevant information to determine appropriate long-term cost share rates within five years of February 12, 1998. For Indian Tribes establishing eligibility pursuant to § 35.220(a), the Regional Administrator may increase the maximum federal share if the Tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used.

(d) The Regional Administrator may provide financial assistance in an amount up to 95 percent of the approved costs of planning, developing, establishing, or approving an air pollution control program and up to 95 percent of the approved costs of maintaining that program to an intertribal agency of two or more Tribes that have established eligibility pursuant to § 35.220(a), which has substantial responsibility for carrying out an applicable implementation plan under section 110 of the Clean Air Act, when such intertribal agency is authorized by the governing bodies of those Tribes to apply for and receive financial assistance. After two years

from the date of each intertribal agency's initial grant award, the Regional Administrator will reduce the maximum federal share to 90 percent, as long as the Regional Administrator determines that the tribal members of the intertribal agency meet certain economic indicators that would provide an objective assessment of the Tribes' ability to increase the non-federal share. For intertribal agencies made up of Indian Tribes establishing eligibility pursuant to § 35.220(a), which have substantial responsibility for carrying out an applicable implementation plan under section 110 of the Clean Air Act, the Regional Administrator may increase the maximum federal share if the intertribal agency can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the member Tribes are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used.

(e) The Regional Administrator may provide financial assistance in an amount up to 60 percent of the approved costs of planning, developing, establishing, or improving an air pollution control program, and up to sixty percent of the approved costs of maintaining that program to Tribes that have not made a demonstration that they are eligible for treatment in the same manner as a state under 40 CFR 49.6, but are eligible for financial assistance under § 35.220(b).

6. Section 35.210 is amended by adding paragraph (c) to read as follows:

§ 35.210 Maintenance of effort.

* * * * *

(c) The requirements of paragraphs (a) and (b) of this section shall not apply to Indian Tribes that have established eligibility pursuant to § 35.220(a) and intertribal agencies made up of such Tribes.

7. Section 35.215 is revised to read as follows:

§ 35.215 Limitations.

(a) The Regional Administrator will not award section 105 funds to an interstate, intertribal or intermunicipal agency which does not provide assurance that it can develop a comprehensive plan for the air quality control region which includes representation of appropriate state, interstate, tribal, local, and international interests.

(b) The Regional Administrator will not award section 105 funds to a local, interstate, intermunicipal, or intertribal agency without consulting with the appropriate official designated by the Governor or Governors of the state or states affected or the appropriate official of any affected Indian Tribe or Tribes.

(c) The Regional Administrator will not disapprove an application for or terminate or annul an award of section 105 funds without prior notice and opportunity for a public hearing in the affected state or area within tribal jurisdiction or in one of the affected states or areas within tribal jurisdiction if several are affected.

8. Section 35.220 is added just before the center heading "Water Pollution Control (section 106)" to read as follows:

§ 35.220 Eligible Indian Tribes.

The Regional Administrator may make Clean Air Act section 105 grants to Indian Tribes establishing eligibility under paragraph (a) of this section, without requiring the same cost share that would be required if such grants were made to states. Instead grants to eligible Tribes will include a tribal cost share of five percent for two years from the date of each Tribe's initial grant award. After two years, the

Regional Administrator will increase the tribal cost share to ten percent, as long as the Regional Administrator determines that the Tribe meets certain economic indicators that would provide an objective assessment of the Tribe's ability to increase its cost share. Notwithstanding the above, the Regional Administrator may reduce the required cost share of grants to Tribes that establish eligibility under paragraph (a) of this section if the Tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used.

(a) An Indian Tribe is eligible to receive financial assistance if it has demonstrated eligibility to be treated in the same manner as a state under 40 CFR 49.6.

(b) An Indian Tribe that has not made a demonstration under 40 CFR 49.6 is eligible for financial assistance under 42 U.S.C. 7405 and 7602(b)(5).

(c) The Administrator shall process a application for financial assistance under this section in a timely manner.

9. Part 49 is added to read as follows:

PART 49—TRIBAL CLEAN AIR ACT AUTHORITY

Sec.

49.1 Program overview.
49.2 Definitions.
49.3 General Clean Air Act authority.
49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.
49.5 Tribal requests for additional Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.
49.6 Tribal eligibility requirements.

49.7 Request by an Indian tribe for eligibility determination and Clean Air Act program approval.
49.8 Provisions for tribal criminal enforcement authority.
49.9 EPA review of Clean Air Act applications.
49.10 EPA review of state Clean Air Act programs.
49.11 Actions under section 301(d)(4) authority.

Authority: 42 U.S.C. 7401, *et seq.*

§ 49.1 Program overview.

(a) The regulations in this part identify those provisions of the Clean Air Act (Act) for which Indian tribes are or may be treated in the same manner as states. In general, these regulations authorize eligible tribes to have the same rights and responsibilities as states under the Clean Air Act and authorize EPA approval of tribal air quality programs meeting the applicable minimum requirements of the Act.

(b) Nothing in this part shall prevent an Indian tribe from establishing additional or more stringent air quality protection requirements not inconsistent with the Act.

§ 49.2 Definitions.

(a) *Clean Air Act* or *Act* means those statutory provisions in the United States Code at 42 U.S.C. 7401, *et seq.*

(b) *Federal Indian Reservation, Indian Reservation or Reservation* means all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(c) *Indian tribe or tribe* means any Indian tribe, band, nation, or other organized group or community, including

any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(d) *Indian Tribe Consortium or Tribal Consortium* means a group of two or more Indian tribes.

(e) *State* means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

§ 49.3 General Tribal Clean Air Act authority.

Tribes meeting the eligibility criteria of § 49.6 shall be treated in the same manner as states with respect to all provisions of the Clean Air Act and implementing regulations, except for those provisions identified in § 49.4 and the regulations that implement those provisions.

§ 49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.

Tribes will not be treated as states with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder:

(a) Specific plan submittal and implementation deadlines for NAAQS-related requirements, including but not limited to such deadlines in sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191 of the Act.

(b) The specific deadlines associated with the review and revision of implementation plans related to major fuel burning sources in section 124 of the Act.

(c) The mandatory imposition of sanctions under section 179 of the Act because of a failure to submit an implementation plan or required plan element by a specific

deadline, or the submittal of an incomplete or disapproved plan or element.

(d) The provisions of section 110(c)(1) of the Act.

(e) Specific visibility implementation plan submittal deadlines established under section 169A of the Act.

(f) Specific implementation plan submittal deadlines related to interstate commissions under sections 169B(e)(2), 184(b)(1) & (c)(5) of the Act. For eligible tribes participating as members of such commissions, the Administrator shall establish those submittal deadlines that are determined to be practicable or, as with other non-participating tribes in an affected transport region, provide for federal implementation of necessary measures.

(g) Any provisions of the Act requiring as a condition of program approval the demonstration of criminal enforcement authority or any provisions of the Act providing for the delegation of such criminal enforcement authority. Tribes seeking approval of a Clean Air Act program requiring such demonstration may receive program approval if they meet the requirements of § 49.8.

(h) The specific deadline for the submittal of operating permit programs in section 502(d)(1) of the Act.

(i) The mandatory imposition of sanctions under section 502(d)(2)(B) because of failure to submit an operating permit program or EPA disapproval of an operating permit program submittal in whole or part.

(j) The "2 years after the date required for submission of such a program under paragraph (1)" provision in section 502(d)(3) of the Act.

(k) Section 502(g) of the Act, which authorizes a limited interim approval of an operating permit program that substantially meets the requirements of Title V, but is not fully approvable.

(l) The provisions of section 503(c) of the Act that direct permitting authorities to establish a phased schedule

assuring that at least one-third of the permit applications submitted within the first full year after the effective date of an operating permit program (or a partial or interim program) will be acted on by the permitting authority over a period not to exceed three years after the effective date.

(m) The provisions of section 507(a) of the Act that specify a deadline for the submittal of plans for establishing a small business stationary source technical and environmental compliance assistance program.

(n) The provisions of section 507(e) of the Act that direct the establishment of a Compliance Advisory Panel.

(o) The provisions of section 304 of the Act that, read together with section 302(e) of the Act, authorize any person who provides the minimum required advance notice to bring certain civil actions in the federal district courts against states in their capacity as states.

(p) The provisions of section 502(b)(6) of the Act that require that review of a final permit action under the Title V permitting program be "judicial" and "in State court," and the provisions of section 502(b)(7) of the Act that require that review of a failure on the part of the permitting authority to act on permit applications or renewals by the time periods specified in section 503 of the Act be "judicial" and "in State court."

(q) The provision of section 105(a)(1) that limits the maximum federal share for grants to pollution control agencies to three-fifths of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards.

Sec. 49.5 Tribal requests for additional Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.

Any tribe may request that the Administrator specify additional provisions of the Clean Air Act for which it would be inappropriate to treat tribes in general in the same manner as states. Such request should clearly identify the provisions at issue and should be accompanied with a statement explaining why it is inappropriate to treat tribes in the same manner as states with respect to such provisions.

§ 49.6 Tribal eligibility requirements.

Sections 301(d)(2) and 302(r), 42 U.S.C. 7601(d)(2) and 7602(r), authorize the Administrator to treat an Indian tribe in the same manner as a state for the Clean Air Act provisions identified in Sec. 49.3 if the Indian tribe meets the following criteria:

(a) The applicant is an Indian tribe recognized by the Secretary of the Interior;

(b) The Indian tribe has a governing body carrying out substantial governmental duties and functions;

(c) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(d) The Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

§ 49.7 Request by an Indian tribe for eligibility determination and Clean Air Act program approval.

(a) An Indian tribe may apply to the EPA Regional Administrator for a determination that it meets the eligibility requirements of § 49.6 for Clean Air Act program approval.

The application shall concisely describe how the Indian tribe will meet each of the requirements of § 49.6 and should include the following information:

(1) A statement that the applicant is an Indian tribe recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the applicant is currently carrying out substantial governmental duties and powers over a defined area. This statement should:

(i) Describe the form of the tribal government;

(ii) Describe the types of government functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and

(iii) Identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian tribe's authority to regulate air quality. For tribal applications covering areas within the exterior boundaries of the applicant's reservation the statement must identify with clarity and precision the exterior boundaries of the reservation including, for example, a map and a legal description of the area. For tribal applications covering areas outside the boundaries of a reservation the statement should include:

(i) A map or legal description of the area over which the application asserts authority; and

(ii) A statement by the applicant's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority (including the nature or subject matter of the asserted regulatory authority) which may include a copy of documents such as tribal constitutions, by-laws,

charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority.

(4) A narrative statement describing the capability of the applicant to administer effectively any Clean Air Act program for which the tribe is seeking approval. The narrative statement must demonstrate the applicant's capability consistent with the applicable provisions of the Clean Air Act and implementing regulations and, if requested by the Regional Administrator, may include:

(i) A description of the Indian tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, *et seq.*), the Indian Mineral Development Act (25 U.S.C. 2101, *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the tribal governing body and a copy of related tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government;

(iv) A description of the existing, or proposed, agency of the Indian tribe that will assume primary responsibility for administering a Clean Air Act program (including a description of the relationship between the existing or proposed agency and its regulated entities);

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective air quality program or a plan which proposes how the tribe will acquire administrative and technical expertise. The plan should address how the tribe will obtain the funds to acquire the administrative and technical expertise.

(5) A tribe that is a member of a tribal consortium may rely on the expertise and resources of the consortium in

demonstrating under paragraph (a)(4) of this section that the tribe is reasonably expected to be capable of carrying out the functions to be exercised consistent with § 49.6(d). A tribe relying on a consortium in this manner must provide reasonable assurances that the tribe has responsibility for carrying out necessary functions in the event the consortium fails to.

(6) Where applicable Clean Air Act or implementing regulatory requirements mandate criminal enforcement authority, an application submitted by an Indian tribe may be approved if it meets the requirements of § 49.8.

(7) Additional information required by the EPA Regional Administrator which, in the judgment of the EPA Regional Administrator, is necessary to support an application.

(8) Where the applicant has previously received authorization for a Clean Air Act program or for any other EPA-administered program, the applicant need only identify the prior authorization and provide the required information which has not been submitted in the previous application.

(b) A tribe may simultaneously submit a request for an eligibility determination and a request for approval of a Clean Air Act program.

(c) A request for Clean Air Act program approval must meet any applicable Clean Air Act statutory and regulatory requirements. A program approval request may be comprised of only partial elements of a Clean Air Act program, provided that any such elements are reasonably severable, that is, not integrally related to program elements that are not included in the plan submittal, and are consistent with applicable statutory and regulatory requirements.

§ 49.8 Provisions for tribal criminal enforcement authority.

To the extent that an Indian tribe is precluded from asserting criminal enforcement authority, the federal government will exercise primary criminal enforcement responsibility. The tribe, with the EPA Region, shall develop a procedure by which the tribe will provide potential investigative leads to EPA and/or other appropriate federal agencies, as agreed to by the parties, in an appropriate and timely manner. This procedure shall encompass all circumstances in which the tribe is incapable of exercising applicable enforcement requirements as provided in § 49.7(a)(6). This agreement shall be incorporated into a Memorandum of Agreement with the EPA Region.

§ 49.9 EPA review of tribal Clean Air Act applications.

(a) The EPA Regional Administrator shall process a request of an Indian tribe submitted under § 49.7 in a timely manner. The EPA Regional Administrator shall promptly notify the Indian tribe of receipt of the application.

(b) Within 30 days of receipt of an Indian tribe's initial, complete application, the EPA Regional Administrator shall notify all appropriate governmental entities.

(1) For tribal applications addressing air resources within the exterior boundaries of the reservation, EPA's notification of other governmental entities shall specify the geographic boundaries of the reservation.

(2) For tribal applications addressing non-reservation areas, EPA's notification of other governmental entities shall include the substance and bases of the tribe's jurisdictional assertions.

(c) The governmental entities shall have 30 days to provide written comments to EPA's Regional Administrator regarding any dispute concerning the boundary of the reservation. Where a tribe has asserted jurisdiction over non-

reservation areas, appropriate governmental entities may request a single 30-day extension to the general 30-day comment period.

(d) In all cases, comments must be timely, limited to the scope of the tribe's jurisdictional assertion, and clearly explain the substance, bases, and extent of any objections. If a tribe's assertion is subject to a conflicting claim, the EPA Regional Administrator may request additional information from the tribe and may consult with the Department of the Interior.

(e) The EPA Regional Administrator shall decide the jurisdictional scope of the tribe's program. If a conflicting claim cannot be promptly resolved, the EPA Regional Administrator may approve that portion of an application addressing all undisputed areas.

(f) A determination by the EPA Regional Administrator concerning the boundaries of a reservation or tribal jurisdiction over non-reservation areas shall apply to all future Clean Air Act applications from that tribe or tribal consortium and no further notice to governmental entities, as described in paragraph (b) of this section, shall be provided, unless the application presents different jurisdictional issues or significant new factual or legal information relevant to jurisdiction to the EPA Regional Administrator.

(g) If the EPA Regional Administrator determines that a tribe meets the requirements of § 49.6 for purposes of a Clean Air Act provision, the Indian tribe is eligible to be treated in the same manner as a state with respect to that provision, to the extent that the provision is identified in § 49.3. The eligibility will extend to all areas within the exterior boundaries of the tribe's reservation, as determined by the EPA Regional Administrator, and any other areas the EPA Regional Administrator has determined to be within the tribe's jurisdiction.

(h) Consistent with the exceptions listed in § 49.4, a tribal application containing a Clean Air Act program submittal will be reviewed by EPA in accordance with applicable statutory and regulatory criteria in a manner similar to the way EPA would review a similar state submittal.

(i) The EPA Regional Administrator shall return an incomplete or disapproved application to the tribe with a summary of the deficiencies.

§ 49.10 EPA review of state Clean Air Act programs.

A state Clean Air Act program submittal shall not be disapproved because of failure to address air resources within the exterior boundaries of an Indian Reservation or other areas within the jurisdiction of an Indian tribe.

§ 49.11 Actions under section 301(d)(4) authority.

Notwithstanding any determination made on the basis of authorities granted the Administrator under any other provision of this section, the Administrator, pursuant to the discretionary authority explicitly granted to the Administrator under sections 301(a) and 301(d)(4):

(a) Shall promulgate without unreasonable delay such federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, Appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

(b) May provide up to 95 percent of the cost of implementing programs for the prevention and control of air

pollution or implementation of national primary and secondary ambient air quality standards. After two years from the date of each tribe's initial grant award, the maximum federal share will be reduced to 90 percent, as long as the Regional Administrator determines that the tribe meets certain economic indicators that would provide an objective assessment of the tribe's ability to increase its share. The Regional Administrator may increase the maximum federal share to 100 percent if the tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe are constrained to such an extent that fulfilling the match would impose undue hardship.

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

10. The authority citation for part 50 is revised to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

11. Section 50.1 is amended by adding paragraph (i) to read as follows:

§ 50.1 Definitions.

* * * * *

(i) *Indian country* is as defined in 18 U.S.C. 1151.

12. Section 50.2 is amended by revising paragraphs (c) and (d) to read as follows:

§ 50.2 Scope.

* * * * *

(c) The promulgation of national primary and secondary ambient air quality standards shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any state or Indian country.

(d) The proposal, promulgation, or revision of national primary and secondary ambient air quality standards shall not prohibit any state or Indian tribe from establishing ambient air quality standards for that state or area under a CAA program or any portion thereof which are more stringent than the national standards.

* * * * *

PART 81--DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

13. The authority citation for part 81 is revised to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

14. Section 81.1 is amended by revising paragraph (a) and adding new paragraphs (c), (d) and (e) to read as follows:

§ 81.1 Definitions.

* * * * *

(a) *Act* means the Clean Air Act as amended (42 U.S.C. 7401, *et seq.*).

* * * * *

(c) *Federal Indian Reservation, Indian Reservation or Reservation* means all land within the limits of any Indian

reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(d) *Indian tribe* or *tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(e) *State* means a state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

Subpart C—Section 107 Attainment Status Designations

15. The authority citation for subpart C, part 81 is revised to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

§ 81.300 [Amended]

16. Section 81.300(a) is amended by revising the third sentence to read "A state, an Indian tribe determined eligible for such functions under 40 CFR part 49, and EPA can initiate changes to these designations, but any proposed state or redesignation must be submitted to EPA for concurrence."

[FR Doc. 98-3451 Filed 2-11-98; 8:45 am]

APPENDIX C

[Filed: July 12, 2000]

United States Court of Appeals
For the District of Columbia Circuit

No. 98-1196 September Term, 1999

Arizona Public Service Company,
Petitioner

v.

Environmental Protection Agency,
Respondent

State of Michigan, et al.,
Intervenors

Consolidated with 98-1203, 98-1206, 98-1207, 98-1208

BEFORE: Edwards, Chief Judge, Ginsburg and Rogers, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of the State of Michigan, et al. filed June 19, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX D

[Filed: July 12, 2000]

United States Court of Appeals
For the District of Columbia Circuit

No. 98-1196 September Term, 1999

Arizona Public Service Company,
Petitioner

v.

Environmental Protection Agency,
Respondent

State of Michigan, et al.,
Intervenors

Consolidated with 98-1203, 98-1206, 98-1207, 98-1208

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc of the State of Michigan, et al., and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E

[Mandate Issued: July 27, 2000]
/s/ E. Brown Deputy Clerk
[Filed May 5, 2000]

United States Court of Appeals
For the District of Columbia Circuit

No. 98-1196 September Term, 1999

Arizona Public Service Company,
Petitioner

v.

Environmental Protection Agency,
Respondent

State of Michigan, et al.,
Intervenors

Consolidated with 98-1203, 98-1206, 98-1207, 98-1208

On Petitions for Review of an Order of the
Environmental Protection Agency

Before: EDWARDS, *Chief Judge*, GINSBURG and ROGERS, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Environmental Protection Agency and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the petitions for review are denied in part and dismissed in part, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: May 5, 2000

Opinion for the Court filed by Chief Judge Edwards.
Opinion concurring in part and dissenting from Part II.A. filed by Circuit Judge Ginsburg.

APPENDIX F

Excerpts from the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*

* * * *

§ 7410. State implementation plans for national primary and secondary ambient air quality standards [CAA § 110]

* * * *

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 760 (d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

* * * *

§ 7474. Area redesignation [CAA § 164]

(a) Authority of States to redesignate areas

Except as otherwise provided under subsection (c) of this section, a State may redesignate such areas as it deems

appropriate as class I areas. The following areas may be redesignated only as class I or II:

(1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and

(2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

The extent of the areas referred to in paragraph[1] (1) and (2) shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990. Any area (other than an area referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 7472(a) of this title) may be redesignated by the State as class III if—

(A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions where appropriate) concurring the State's redesignation;

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[1] So in original. Probably should be "paragraphs".

(B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

(C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

(b) Notice and hearing; notice to Federal land manager; written comments and recommendations; regulations; disapproval of redesignation

(1)(A) Prior to redesignation of any area under this part, notice shall be afforded and public hearings shall be conducted in areas proposed to be redesignated and in areas which may be affected by the proposed redesignation. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation shall be prepared and made available for public inspection and prior to any such redesignation, the description and analysis of such effects shall be reviewed and examined by the redesignating authorities.

(B) Prior to the issuance of notice under subparagraph (A) respecting the redesignation of any area under this subjection, if such area includes any Federal lands, the State shall provide written notice to the appropriate Federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the State respecting the intended

notice of redesignation and to submit written comments and recommendations with respect to such intended notice of redesignation. In redesignating any area under this section with respect to which any Federal land manager has submitted written comments and recommendations, the State shall publish a list of any inconsistency between such redesignation and such recommendations and an explanation of such inconsistency (together with the reasons for making such redesignation against the recommendation of the Federal land manager).

(C) The Administrator shall promulgate regulations not later than six months after August 7, 1977, to assure, insofar as practicable, that prior to any public hearing on redesignation of any area, there shall be available for public inspection any specific plans for any new or modified major emitting facility which may be permitted to be constructed and operated only if the area in question is designated or redesignated as class III.

(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with the requirements of section 7472(a) of this title or of subsection (a) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian

governing body shall be subject in all respect to the provisions of subsection (e) of this section.

(d) Review of national monuments, primitive areas, and national preserves

The Federal Land Manager shall review all national monuments, primitive areas, and national preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within[2] supporting analysis, to the Congress and the affected States within one year after August 7, 1977. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

(e) Resolution of disputes between State and Indian tribes

If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air

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[2] So in original. Probably should be "with".

quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

* * * *

§ 7601. Administration [CAA § 301]

* * * *

(d) Tribal authority

(1) Subject to the provisions of paragraph (2), the Administrator—

(A) is authorized to treat Indian tribes as States under this chapter, except for purposes of the requirement that makes available for application by each State no less than one-half of 1 percent of annual appropriations under section 7405 of this title; and

(B) may provide any such Indian tribe grant and contract assistance to carry out functions provided by this chapter.

(2) The Administrator shall promulgate regulations within 18 months after November 15, 1990, specifying those provisions of this chapter for which it is appropriate to treat

Indian tribes as States. Such treatment shall be authorized only if—

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

(5) Until such time as the Administrator promulgates regulations pursuant to this subsection, the Administrator may continue to provide financial assistance to eligible Indian tribes under section 7405 of this title.

Excerpts from the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*

§ 461. Allotment of land on Indian reservations [IRA § 1]

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

* * * *

§ 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption [IRA § 5]

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

* * * *

§ 467. New Indian reservations [IRA § 7]

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the executive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.